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No. 80-693

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SIFFRIN RESIDENTIAL ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED OF STARK COUNTY, INC., *et al.*,
Petitioners,

v.

ALEX J. AND MARY GARCIA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

WHETHER THE CITY OF CANTON'S APPLICATION OF ITS ZONING ORDINANCE TO PROHIBIT MENTALLY RETARDED PERSONS FROM LIVING IN "FAMILY HOMES" IN ITS TWO-FAMILY RESIDENTIAL DISTRICT WHILE PERMITTING COLLEGE STUDENTS, ELDERLY PERSONS AND OTHER GROUPS OF UNRELATED PERSONS TO LIVE IN THIS DISTRICT VIOLATES THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

PARTIES TO THIS PROCEEDING IN THE COURTS BELOW

In addition to the parties listed in the caption on the cover page, the following were parties to the proceedings below:

Dr. Timothy Moritz,* Director,
Department of Mental Health and
Mental Retardation,

Petitioner,

and

Dr. Levester Cannon,* Commissioner,
Division of Mental Retardation and
Developmental Disabilities, Department of
Mental Health and Mental Retardation,

Petitioner;

William J. Brown, Attorney General,
State of Ohio,

Petitioner;

and

Ohio Legal Rights Service,

Petitioner;

and

The City of Canton, Ohio,

Respondent.

*Dr. Timothy Moritz and Dr. Levester Cannon were named as party-defendants in the complaints originally filed in this case because of their responsibility for licensing of "family homes" under Ohio law. Effective July 1, 1980, Ohio Am. Sub. H.B. No. 900 provided for a reorganization of the Ohio Department of Mental Health and Mental Retardation by splitting it into two distinct departments — a Department of Mental Health and a Department of Mental Retardation and Developmental Disabilities. Dr. Rudy Magnone, acting director of the Department of Mental Retardation and Developmental Disabilities, replaces Dr. Timothy Moritz and Dr. Levester Cannon as the party responsible for licensing of "family homes" under Ohio law. Ohio Rev. Code. Ann. §5123.19(C) (Page's Leg. Bull. at 338. 1980).

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio, which appears in the appendix hereto, p. A-1, *infra,* is reported at 63 Ohio St. 2d 259 (1980).

The opinion of the Stark County Court of Appeals, Fifth Appellate District, Ohio, is not reported. It is reprinted in the appendix hereto, p. A-28, *infra.*

The opinion of the Court of Common Pleas of Stark County, Ohio is not reported. It is reprinted in the appendix hereto, p. A-46, *infra.*

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 30, 1980. See p. A-68, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U.S. Const. amend. XIV, §1 (Appendix p. A-68, *infra.)*

Ohio Rev. Code Ann. §5123.19(A) (3) (Pages Supp. 1979) (Appendix p. A-68, *infra.*)

Canton, Ohio Zoning Ord. §§1123.08, 1123.24, 1123.25, 1123.26, 1123.27, 1123.30, 1135.01, 1135.02, 1137.01, 1137.02 (1977) (Appendix, p. A-68, *infra.*)

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ALEX J. AND MARY GARCIA, *et al.*,
Respondents.

STATEMENT OF THE CASE

Petitioner Siffrin Residential Association is an Ohio non-profit corporation whose purpose is the planning, promoting, and development of supervised, normal living environments for mentally retarded citizens of Stark County, Ohio. In November of 1977 the Siffrin Residential Association purchased a home at 1532 Yale Avenue in Canton, Ohio which it planned to use as a residence for up to eight mentally retarded persons. The residence was to be a "family home" as defined in Ohio Rev. Code Ann. §5123.18(A) (3) (Page's Supp. 1979).[1]

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[1]Effective July 1, 1980, §5123.18 has been renumbered as §5123.19 by Ohio Am. Sub. H.B. 900. Ohio Rev. Code Ann. §5123.19 (Page's Leg. Bull. at 338, 1980). References in this petition will be to Ohio Rev. Code Ann. §5123.18 (Page's Supp. 1979).

In April and May of 1978, Alex J. and Mary L. Garcia (neighbors to the proposed home) and the City of Canton filed complaints in the Common Pleas Court of Stark County to enjoin the Siffrin Residential Association from using its Yale Avenue property as a "family home". Complainants also named officials within the Ohio Department of Mental Health and Mental Retardation (Dr. Timothy Moritz and Dr. Levester Cannon) as well as William J. Brown, Attorney General of the State of Ohio, as defendants. The Ohio Legal Rights Service, a state agency mandated by Ohio law, Ohio Rev. Code Ann. §5123.94 (Page's Supp. 1979),[2] to "protect and advocate the rights" of persons who are mentally retarded, was granted leave to intervene as a party-defendant in the Common Pleas Court.

On May 10, 1978 a preliminary injunction was granted by the Common Pleas Court restraining petitioners from licensing or using the Yale Avenue property as a "family home". A trial was held before the Common Pleas Court on June 26-27, 1978.

The property in question is a two-story, five-bedroom home with approximately 2000 square feet of living space. Each floor contains a large living room, kitchen, dining room and bathroom. The first floor also has a large sunroom as well as an attached two-car garage. The proposed use of the home would involve no significant architectural or structural alteration.

Residents of the home would include up to eight mentally retarded citizens of Stark County and a married couple who would provide supervision and care as needed. The mentally retarded residents would be women in the low mild or high moderate range of disability, who were free of behavioral or emotional problems which would preclude community living. All residents would be either employed competitively or in a training program for competitive employment.

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[2]Effective July 1, 1980, this provision has been renumbered as §5123.60 by Ohio Am. Sub. H.B. No. 900. Ohio Rev. Code Ann. §5123.60 (Page's Leg. Bull. at 344, 1980).

Residents would perform household chores, cook, eat, sleep, and participate in decision-making and recreation as a single housekeeping unit. For example, responsibility for grocery shopping, planning of meals, and cooking for the entire household would be shared by the individual members of the household.

The home is located in Canton's R-2 zoning district. Permitted uses in the R-2 disrict include single-family and two-family dwellings.[3] Canton Zoning Ord. §1137.02 (1977). At the time the dispute in this case arose, the Canton zoning ordinance contained a "single housekeeping unit" definition of "family" which specifically negated any requirement that household members be related by blood or marriage. Canton Zoning Ord. §1123.30 (1977).[4] Canton's zoning inspector, Mr. Robert Pace, whose duties include enforcement of the zoning ordinance, testified that four, five, eight, even twenty unrelated college students renting the home at issue and living there as a single housekeeping unit would be considered a "family" and thus a permitted use in the R-2 district. Similarly, he testified that a group of unrelated elderly persons could live in the home while pooling their resources in order to meet the collective cost of groceries, rent and a live-in housekeeper to take care of them. His testimony repeatedly was that groups of unrelated persons could live together in the home at issue, that they would be considered "families" under the Canton definition, and that they would be permitted uses in the R-2 district.

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[3]In addition to single-family and two-family dwellings, permitted uses in the R-2 district include some churches, parsonages, convents, schools, public libraries and museums, public parks, playgrounds, recreational and community center buildings, and colleges and universities (including some dormitories). Canton Zoning Ord. §§1135.02 and 1137.02 (1977).

[4]After the legal action in this case was initiated, the City of Canton amended its zoning definition of "family" to require relationship by blood or marriage and to specifically exclude "family homes" for the mentally retarded from the scope of the definition. (Ord. No. 188578, 1978).

The neighborhood around 1532 Yale Avenue consists primarily of rental units with a mix of single-family and multi-family dwellings. Several duplexes line both sides of the 1500 block of Yale Avenue. Just four or five doors south of the Siffrin home is a six-unit apartment building. An area zoned for business uses including medical and dental clinics, business offices, fraternity and sorority houses, dormitories, and apartment buildings lies just one block south of the Siffrin home.

On August 18, 1978, the trial court rendered its decision and judgment entry permanently enjoining petitioners Moritz and Cannon from issuing a license and permanently enjoining Siffrin Residential Association from using its Yale Avenue property as a "family home". The trial court decision was adverse to petitioners on three major issues which were litigated below:

> (1) Whether Ohio Revised Code §5123.18(D) which provided that any "person may operate a licensed family home as a permitted use in any residential district or zone including any single-family residential district or zone of any political subdivision" and permitted the Siffrin family home use was constitutional as a matter of Ohio and federal onstitutional law;
> (2) Whether the Siffrin home was a permitted use as a "family" as defined in Canton Zoning Ord. §1123.30 (1977);
> (3) Whether application of the Canton Zoning Code to exclude the Siffrin home from the R-2 zone would violate the due process and equal protection clauses of the United States Constitution.

All petitioners timely filed appeals to the Stark County Court of Appeals which, on March 7, 1979, reversed the decision of the trial court as to each of the three issues listed above and dissolved all injunctive relief. From March, 1979 through June, 1980 the Siffrin home was licensed and used as a "family home" by four mentally retarded residents of Stark County.

The City of Canton and the Garcias appealed to the Ohio Supreme Court which reversed the decision of the Stark County Court of Appeals as to each of the above three issues. Although the Siffrin Residential Association is currently enjoined from using its property as a "family home" for mentally retarded persons, its intent is to reinstate such use of its property if the injunction is dissolved. Only the federal questions contained in the third issue listed above are here presented to this Court for review.

HOW FEDERAL QUESTION WAS RAISED AND PRESERVED

The federal question was first raised as affirmative defenses in two petitioners' answers to the complaints filed in the Common Pleas Court of Stark County. For example, in the Answer of Siffrin Residential Association the Ninth Defense, paragraph 27 stated:

> A zoning ordinance restricting licensed family homes for developmentally disabled persons from any residential district would violate the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution.

This was preserved in oral argument at the preliminary injunction hearing and in petitioners' pre-trial and post-trial memoranda.

On appeal to the Stark County Court of Appeals the federal question was raised as a separate assignment of error in the briefs and argument of all petitioners. In its Assignment of Error No. II, page 24 of its Brief, the Ohio Legal Rights Service stated:

> The lower court erred in excluding the proposed home from the R-2 zoning district because such an interpretation and application of the Canton Zoning ordinance would violate. . .the due process and equal protection clauses of the 14th Amendment to the United States Constitution. . .

The Court of Appeals, in reversing the lower court, did specifically address this assignment of error, stating at pages 11-12 of its opinion:

> This assignment of error is well taken. The Canton zoning law applied in an R-2 district is unconstitutional. . .Cf. *Women's Kansas City St. Andrew Soc. v. Kansas City* (8th Cir. 1932), 58 F. 2d 593; *Village of University Hts. v. Cleveland Jewish Orphans' Home* (6th Cir. 1927), 20 F. 2d 743. (Appendix, p. A-37, *infra).*

In the jurisdictional statements and briefs to the Ohio Supreme Court the federal issue was again raised and preserved in separate propositions of law presented by all petitioners. In their Proposition of Law No. 2, page 12 of their memorandum opposing jurisdiction and page 25 of their Brief, petitioners Moritz and Cannon stated:

> The exclusion of a family home for developmentally disabled persons from a district zoned for two family dwelling units, by a municipal corporation which permits similarly situated non-developmentally disabled persons to live therein as a single housekeeping unit, violates. . .the 14th Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES IMPORTANT AND RECURRING ISSUES REGARDING APPLICATION OF ZONING PROVISIONS TO EXCLUDE HANDICAPPED PERSONS FROM LIVING TOGETHER IN FAMILY RESIDENTIAL DISTRICTS.

The decision below held that the provision of the Canton zoning ordinance excluding a "family home" for mentally retarded persons from Canton's R-2 zoning district was "a reasonable exercise of the police power" which was not "arbitrary, capricious or discriminatory in its operation". 63 Ohio St. 2d, at 274. The Canton ordinance did not restrict unrelated people from living together in residential districts. Indeed, the ordinance expressly provided, at the time this suit arose, that groups of unrelated persons were within the ambit of its definition of "family" for purposes of zoning. Canton Zoning Ord. §1123.30 (1977). By its own admission at trial, Canton interpreted its zoning definition of family to include unrelated college students, unrelated senior citizens with live-in housekeepers, or other groups of unrelated individuals. Thus, the instant case raises federal issues distinct from those resolved in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). In *Village of Belle Terre* the zoning ordinance specifically required that "families" be related by blood, marriage or adoption. This Court rejected constitutional challenges to such a definition brought by a property owner renting to six unrelated college students.

In addition to the open-ended definition of "family" in this case, another key factor distinguishes the instant facts from those in *Village of Belle Terre.* The residents of the "family home" at issue, unlike college students, will live in "a family setting" (as required by Ohio Rev. Code Ann. §5123.18(D) (Page's Supp. 1979)) and will fulfill the "family needs" and emulate the "family values" intended to be protected by

single-family zoning. 416 U.S. at 9. A third key distinction between this case and *Village of Belle Terre* is that the Siffrin home is located in an R-2 zone in an area which includes significant development of multi-family housing as opposed to the exclusively single-family nature of the zoning district involved in *Village of Belle Terre.*

In *Moore v. City of East Cleveland,* 431 U.S. 494, 498 (1977) this Court, in its plurality opinion, again stressed the importance of protecting "family needs" and "family values" through zoning. It was specifically recognized, however, that the "constitutional right to live together as a family" extends beyond the nuclear family. *Id.,* at 500. Thus, East Cleveland's zoning provision which prohibited a grandmother from living in the same household with two grandsons was found to be unconstitutionally restrictive. The plurality and concurring opinions in *Moore* explicitly recognized "economic" and "emotional" needs as significant bases for the tradition of the extended family. *Id.,* at 505, 508-509. "Family homes", like the extended family considered in *Moore,* are established in response to pressing economic and emotional needs of their mentally retarded residents. Such homes are designed as family living arrangements; they promote "family needs" and "family values" and should similarly be protected from needlessly restrictive zoning regulations. As stated in *Moore:*

> when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. 431 U.S. at 499.

Here, the City of Canton has advanced no interest which would be furthered by excluding mentally retarded persons from living together in the Siffrin home.

The need to reintegrate mentally retarded citizens from institutions into normal community living situations has been a consistent focus of professional thought, governmental policy and court actions for the past two decades. The pressing importance of this issue is reflected in the record now before this Court in *Halderman v. Pennhurst State School & Hospital,* 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part,* 612 F. 2d 84 (3d Cir. 1979), *cert. granted,* 100 S. Ct. 2984 (Nos. 79-1404, 79-1408, 79-1414, 79-1415, 79-1489, June 9, 1980).

Exclusionary zoning has become a major obstacle to providing community residences not only in Ohio but nationwide. The American Bar Association Commission on the Mentally Disabled recently reported:

> The activities of local communities in the last few years demonstrate beyond question that many, for whatever reasons, will do whatever they can by means of exclusionary zoning laws and practices to frustrate efforts to establish community homes. *Zoning for Community Homes,* 1-2 (1978).

The City of Canton in this case sought to restrict "family homes" to the most intensively developed residential districts, the boarding house and apartment districts. These districts amount to about 20% of the total area of residential districts and are primarily clustered on the fringes of the business and industrial zones in the southeastern portion of the city *(See,* Exhibit A of Ohio Legal Rights Service, City of Canton Official Zoning Map depicting location of zoning districts). Canton has advanced no reason for so restricting location of "family homes." Significantly, a report of the American Society of Planning Officials has recommended against restricting such homes to just a few residential districts, warning that such a scheme is counterproductive "in that it may inadvertently recreate the institutional

atmosphere." Lauber and Bangs, *Zoning for Family and Group Care Facilities,* ASPO Report No. 300 (March, 1974).

In order to promote establishment of "family homes" and "group homes" and to prevent overconcentration in any one city or residential district, the Ohio General Assembly in 1977 enacted Ohio Substitute Senate Bill No. 71 which provided that "[a]ny person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision." Ohio Rev. Code Ann. §5123.18(D) (Page's Supp. 1979). The same legislation provided that persons may operate the larger homes, "group homes," in any multi-family residential district or zone. *Id.,* §5123.18(D). The Ohio Supreme Court invalidated the above provisions of Ohio law as repugnant to the Ohio Constitution. Petitioners do not seek review of the issues relative to the constitutional validity of the above provisions of §5123.18. That these provisions regarding location of homes in residential districts have been annulled, however, underscores the importance of a resolution of the federal questions regarding the extent to which municipalities may regulate location of such homes. As Mr. Justice Brown of the Ohio Supreme Court stated in his dissenting opinion in this case:

> the line to be drawn has conveniently moved in a manner to exclude the family homes, which have been deemed to be so desperately needed. If such a trend should continue the only place for such homes may be factory districts and other non-residential areas. 63 Ohio St. 2d at 277.

Canton's "single housekeeping unit" definition of "family" is frequently utilized in municipal zoning ordinances. See, Annot., 71 A.L.R. 3d 693, §§7-9, pp. 711-719 (1976). Thus the Ohio decision is potentially precedent in many

municipalities across the nation, and could adversely impact upon establishment of similar homes in many communities other than Canton.

The Ohio Supreme Court decision not only invites municipal and neighborhood resistance through narrow application of zoning code definitions of family; it also revives private restrictive covenants as a viable means of excluding "family homes" from residential properties. Prior to the Ohio Supreme Court decision, courts in Ohio as well as in other states had held that private convenants limiting use of property to "single family dwellings" could not be enforced to exclude group homes for the handicapped. *Adams v. Toledo City Plan Commission,* No. L-78-006 (Lucas Co. Ct. App. August 18, 1978); *Berger v. State,* 71 N.J. 206, 304 A. 2d 993 (1976); *State ex rel. Region II Child & Family Services, Inc. v. District Court,* Mont. , 609 P. 2d 245 (1980).

The decision below negatively impacts upon all persons who depend upon others in society for care and support. Most tragically, this Ohio decision has legitimitized the attitudes and actions of those who consider the handicapped to be second-class citizens not fully entitled to live in the mainstream of society. So long as this decision is permitted to stand it enhances the stigma associated with mental retardation, chills the establishment of community homes for citizens without a traditional family to provide needed care or emotional support, and encourages continued isolation and alienation of the handicapped from those who label themselves "normal".

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS.

The effect of the decision below is to exclude unrelated mentally retarded citizens from living together in all but the most crowded, most congested residential districts, the R-4 districts. At the same time, the Canton ordinance would not prevent a group of unrelated college students from moving into any of its residential districts. The broadest view of the police power should not be allowed to justify such a discrimination grounded to immutable personal characteristics such as race or mental capacity. Zoning ordinances violate due process when they do not bear a substantial relation to the public health, safety, morals, or general welfare. *Nectow v. City of Cambridge,* 277 U.S. 183 (1928); *Euclid v. Ambler Realty Co.,* 272 U.S. 366 (1926). Neither the City of Canton nor the Ohio Supreme Court has advanced a governmental objective which would reasonably justify exclusion of the proposed home under the Canton Zoning Ordinance.

The decision below conflicts in principle with the decisions of several state courts of last resort and two federal courts of appeals. Mr. Justice Stevens, in his concurring opinion in *Moore v. City of East Cleveland,* 431 U.S. 494, 519 (1977), cogently summarized the overwhelming authority from state courts which have considered the issues involved in this case:

> The state decisions have upheld zoning ordinances which regulated the identity, as opposed to the number, of persons who may compose a household only to the extent that the ordinances require such households to remain nontransient, single-housekeeping units.

The New York Court of Appeals, for instance, has held that a group home consisting of a married couple, their two

children, and ten foster children was a "family" under a zoning ordinance requiring relationship by blood or marriage. *City of White Plains v. Ferraioli,* 34 N.E. 2d 300, 313 N.Y. 2d 756, 357 N.Y.S. 2d 449 (1974). The Court determined that such a home would not conflict with a "stable, uncongested single family environment," finding to the contrary that the home was "deliberately designed to conform with" the character of such a neighborhood. 34 N.Y. 2d at 305, 313 N.E. 2d at 758, 357 N.Y.S. 2d at 452.

The Supreme Court of New Jersey has also held that application of zoning provisions to exclude a group home for multi-handicapped preschool children from a single-family residential zone was an unconstitutional violation of due process. *Berger v. State,* 71 N.J. 206, 223-224, 364 A. 2d 993, 1002 (1976). The New Jersey Court noted that although *Village of Belle Terre, supra,* allows a city to exercise zoning authority in order to "preserve a family style of living," that "[t]he means chosen must have a real and substantial relation to the end sought to be achieved" and "the regulation must be reasonably designed to resolve the problem without imposing unnecessary and excessive restrictions on the use of private property." 71 N.J. at 223-224, 364 A. 2d at 1002. The New Jersey Supreme Court found that the group home conformed to the neighborhood scheme of residential living and that the ordinance definition of family was excessively restrictive:

> When the. . .ordinance defining "family". . .is measured against the demands of due process, it is clear that the regulation must fall. It so narrowly delimits the persons who may occupy a single family dwelling as to prohibit numerous potential occupants who pose no threat to the style of family living sought to be preserved. As such, we cannot conclude that the definition of "family" is reasonable. 71 N.J. at 224, 364 A. 2d at 1002.

Significantly, both *Berger* and *City of White Plains* involved ordinances expressly prohibiting groups of unrelated persons from living in single-family districts. Nevertheless the courts of last resort in these states found unreasonable the application of such a restriction to exclude group homes which essentially conformed to a family style of living. Even more unreasonable is the situation presented in this case in which a city such as Canton expressly *allows* groups of unrelated persons to live together in its family residential districts yet seeks to exclude mentally retarded persons from doing the same.

The federal court decisions on this issue also conflict with the Ohio Supreme Court's position. In 1927, the Court of Appeals for the Sixth Circuit held that a zoning ordinance, though valid in its "general aspects", was unreasonably applied to exclude an orphans' home from an exclusively residential neighborhood. *Village of University Heights v. Cleveland Jewish Orphans' Home,* 20 F. 2d 743 (6th Cir. 1927), *cert. denied,* 275 U.S. 569 (1927).

The Court of Appeals for the Eighth Circuit has followed the Sixth Circuit in holding that a city's attempt to apply its zoning ordinance to exclude a home for elderly women from a residential district was arbitrary, and unrelated to the public health, safety, morals and general welfare. *Women's Kansas City St. Andrew Society v. Kansas City,* 58 F. 2d 593 (8th Cir. 1932). In that case, as here, a non-profit corporation sought to locate the home in a zone designated primarily for one- and two-family residences. The Court rejected the notion that exclusion was justifiable because aged people may have a "depressing effect" on some people or because of "aesthetic" considerations. *Id.,* at 603. The Court found Kansas City's exclusion of the home to be unrelated to any legitimate zoning purposes and thus an unconstitutional application of its zoning ordinance.

As in the above-cited cases, exclusion of the Siffrin home from the rental neighborhood surrounding 1532 Yale

Avenue goes beyond the constitutional limits of the municipal power. When eight unemployed, unrelated college students each owning a car could rent and occupy the home in question, logic and rationality must be totally ignored in order to justify excluding mentally retarded persons who would live in a family setting in order to meet family needs, who would be employed, and who would have no cars.

In conclusion, the Supreme Court of Ohio's decision in this case raises important and recurring issues regarding application of zoning provisions to exclude handicapped persons from living together in residential zoning districts. It conflicts with decisions of other state courts of last resort and federal courts of appeals. For these reasons, petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on July 30, 1980.

Respectfully submitted,

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Rights Service

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For Writ Of Certiorari have been served on Respondents City of Canton and Garcias by forwarding such copies to the offices of their counsel Harry Klide, Esq., Law Director, City of Canton, City Hall, Canton, Ohio, 44702, Counsel for Respondent City Canton, and Vincent Bernabei, Esq., 820 Renkert Bldg., Canton, Ohio 44702, Counsel for Respondents Garcias, by United States mail, postage paid, this day of , 1980. I further certify that all parties required to be served have been so served.

GEORGE STRICKER, JR.
Assistant Attorney General

GARCIA ET AL., APPELLANTS, *v.* SIFFRIN RESIDENTIAL ASSN. ET AL., APPELLEES.

[Cite as Garcia v. Siffrin (1980), 63 Ohio St. 2d 259.]

Municipal corporations—Zoning—Permitted uses—Family homes—R.C. 5123.18(D), (E) and (G), unconstitutional.

1. A "family home," as defined in R.C. 5123.18(A)(3), is not a "family" use, as defined in the Canton city zoning ordinance, and is not a permitted use in the R-2 zoned district under such ordinance.
2. The enactment of zoning laws by a municipality is an exercise of the "police power," rather than an exercise of the power of "local self-government," as granted by Section 3, Article XVIII of the Ohio Constitution.
3. R.C. 5123.18(D) and (E) are not "general laws" of the state within the meaning of Section 3, Article XVIII of the Ohio Constitution; therefore, Chapter 1137 of the Canton city zoning ordinance, which prohibits a "family" use as contemplated by R.C. 5123.18 is not unconstitutionally in conflict with a "general law" of the state.
4. R.C. 5123.18(D), (E) and (G) are "special laws" in violation of Section 26, Article II of the Ohio Constitution, and are therefore unconstitutional.

(No. 79-409—Decided July 30, 1980)

APPEAL from the Court of Appeals for Stark County.

The appellee herein, Siffrin Residential Association (Siffrin), is an Ohio non-profit corporation formed to promote the development of a residential, rather than an institutional, type of living environment for certain mentally retarded persons of Stark County, pursuant to the provisions

of R.C. 5123.18, which provides for the licensing, inspection and operation of "residential facilities."[1]

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[1]Ohio for a number of years has by law provided for the licensing of facilities for the care of mentally retarded persons. Such licensure provision was contained in R.C. 5123.18. In 1977, the General Assembly enacted a new R.C. 5123.18 which became effective on October 31, 1977. The new section was included within Am. Sub. S.B. No. 71.

The portions of R.C. 5123.18 as enacted which are germane to this discussion are as follows:

"(A) As used in this section and section 5123.19 of the Revised Code:

"(1) 'Residential facility' means a home or facility in which a person with a developmental disability resides, except a home subject to Chapter 3721 of the Revised Code or the home of a relative or legal guardian in which a person with a developmental disability resides.

"(2) 'Developmental disability' means a disability that originated before the attainment of eighteen years of age and can be expected to continue indefinitely, constitutes a substantial handicap to the person's ability to function normally in society, and is attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other condition found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior or requires similar treatment and services.

"(3) 'Family home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for not more than eight persons with developmental disabilities.

"(4) 'Group home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for at least nine but not more than sixteen pesons with developmental disabilities.

"(B) Every person desiring to operate a residential facility shall apply for licensure of the facility to the chief of the division of mental retardation and developmental disabilities.

"***

"(D) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are uniformly imposed upon all single-family residences within the district or zone.

"(E) Any person may operate a licensed group home as a permitted use in any multiple-family residential district or zone of any political subdivision, except that a political subdivision that has enacted a zoning ordinance or resolution establishing planned unit development districts may exclude group homes from such districts, and a political subdivision that has enacted a zoning ordinance or resolution may regulate group homes in multiple-family residential districts or zones as a conditionally permitted use or special exception, in either case, under

In November 1977, Siffrin purchased a residence at 1532 Yale Avenue, N.W., Canton, for the proposed use as a "residential facility" to house eight or fewer "developmentally disabled" female adults. This site is in an area zoned R-2 within Chapter 1137 of the Canton City Ordinances, which zoning classification restricts the sites to one and two-family dwellings.[2]

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reasonable and specific standards and conditions set out in the zoning ordinance or resolution to:

"(1) Require the architectural design and site layout of the home and the location, nature, and height of any walls, screens, and fences to be compatible with adjoining land uses and the residential character of the neighborhood;

"(2) Require compliance with yard, parking, and sign regulation;

"(3) Limit excessive concentration of homes.

"(F) This section does not prohibit a political subdivision from applying to residential facilities nondiscriminatory regulations requiring compliance with health, fire, and safety regulations and building standards and regulations.

"(G) Divisions (D) and (E) of this section are not applicable to municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed residential facilities by means of permitted uses, conditional uses, or special excpetion, so long as such ordinance remains in effect without any substantive modification.

[2]The sections of Chapter 1137 of the Canton city zoning ordinance which are pertinent to this discussion are as follows:

"1137.02 Permitted Uses

"Principal permitted uses are as follows:

"(a) Any use permitted in the R-1 Distict.

"(b) Two-family dwellings."

Within the zoning ordinances of Canton we find the following definitions:

"1123.24 Dwelling.

" 'Dwelling unit' means any building or portion thereof, which is designed for or used for residential purposes; including one and two-family and multi-family, but not including a tent, tourist cabin, trailer, trailer coach, hotels, motels, boarding houses or lodging houses."

"1123.25 Dwelling unit.

" 'Dwelling unit' means a group of rooms arranged, maintained or designed to be occupied by a single-family (see definition of family), and consists of a complete bathroom, complete kitchen or kitchenette; and facilities for living, sleeping and eating. All of the facilities are to be located in contiguous rooms and used exclusively by such family and by any authorized persons occupying such dwelling unit with the family."

"1123.27 Dwelling, Two-family.

Appellants, Alex J. and Mary L. Garcia, are owners of a residence located adjacent to the proposed facility, in which residence they have lived for approximately 25 years.

In March 1978, Siffrin made application to the Ohio Department of Mental Health and Mental Retardation, pursuant to R.C. 5123.18, for licensure of the home. The department, pursuant to law, issued a notice to the Canton Planning Commission, Canton Board of Zoning Appeals and the Clerk of Canton City Council, prior to the publication of the required legal notice. Letters of objection to the proposed location were filed by Mr. Garcia and another neighbor. Subsequently, a petition was signed by some 50 residents in the neighborhood, objecting to the location of this facility.

The Canton Zoning Department also filed a letter of objection, stating that the proposed use was neither a permitted use nor a conditional use in a R-2 district, and that the home as proposed could only qualify as a "boarding house" or "rooming house," a conditional use in a R-4 residential district.

The Department of Mental Health and Mental Retardation reviewed the objections, including that of the city of Canton, and determined that zoning restrictions imposed by the ordinance were superseded by the effect of R.C. 5123.18 and, more specifically, subsection (D) thereof, which, in pertinent part, states as follows:

"Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision."

" 'Two-family dwelling' means a building designed for or used exclusively for residence purposes by two families living independently of each other."

"1123.30 Family.

" 'Family' means one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, lodging house, motel, hotel, fraternity or sorority house."

This present cause was thereafter instituted on April 21, 1978, by the filing of the complaint by the Garcias, in the Court of Common Pleas of Stark County (case No. 78-450), seeking to enjoin Siffrin from establishing a "family home" at 1532 Yale Avenue, and requesting that R.C. 5123.18(D) be declared unconstitutional. Appellants also requested that Drs. Moritz and Cannon of the Department of Mental Health and Mental Retardation be enjoined from licensing the home.

The city of Canton filed a complaint against the same defendants, also seeking to enjoin the licensing and establishment of this "family home," and to have R.C. 5123.18(D) declared unconstitutional.

Appellee, Ohio Legal Rights Service, moved and was granted leave to intervene as a party-defendant in case No. 78-450. The cases were consolidated and after a hearing, a preliminary injunction was granted to the plaintiffs enjoining the director from issuing a license for this operation.

Upon trial of this matter, evidence was adduced showing that Siffron is a corporate entity controlled by a board of directors; that the corporation has at least one other "residential facility" in operation; and that the overall operations of this proposed facility, as well as the currently operating facility, are under the control of a director. The staff that was to be brought into this proposed operation, in addition to the director, would be a married couple who would reside on the premises, two other women working full-time, and other special purpose training staff as needed to carry out the "habilitation services" and "personal care" as provided by statute and regulations. "Habilitation," as defined in R.C. 5123.68(G), "means the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental,

social, and vocational efficiency. Habilitation includes but is not limited to programs of formal, structured education and training***."

The director and an admissions committee screen the applicants for the home, and individual month-to-month contracts are entered into with either the individual, member of the family or guardian, or the state of Ohio if the person was institutionalized. The amount charged for the services to be given the individual varies with the physical or educational needs or requirements of the individual. The clients are persons with one or more "developmental disabilities"; all are characterized by deficiencies in adaptive behavior, in socialization, and in life skills, and some have both neurological and organic disabilities or damage.

The budget for this facility would be approximately $61,000, "broken down***[into] direct care, indirect staff cost for secretarial, administrative, administrative non-personnel cost, telephone, travel, things of this nature, food, mortgage, utilities, depreciation, insurance, things like this." There is a rather complex funding of residents, including federal and state funds for room and board reimbursement.

Thereafter, on August 18, 1978, Judge DeHoff, of the Court of Common Pleas of Stark County, issued his findings of fact and conclusions of law. Among the findings of fact of the trial court are the following:

"20. Under the definitions contained in Chapter 1123 of the Canton City Ordinance, 'family' means one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, and who do not pay consideration for living there and who do not have an 'operator' running the dwelling.

"21. Ohio Revised Code Section 5123.18 defines 'family home' as a residential facility that provides room and board, personal care, habilitation services, and supervision in a

family setting for not more than eight persons with developmental disabilities.

"22. Ohio Revised Code Section 5123.18(B) provides that persons desiring to *operate* a family home residential facility must apply for a license. [Emphasis *sic.*]

"23. The proposed Siffrin Residential Association for the Developmentally Disabled of Stark County 'family home' will house up to eight female adults, two full-time houseparents and a part-time relief staff employed by Siffrin Association for the Developmentally Disabled of Stark County and will be administered by a full-time director.

"24. The proposed Siffrin Residential Association for the Developmentally Disabled of Stark County 'family home' will operate when at full capacity, on a budget of $65,000 per year.

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"26. Location of the proposed 'family home' at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, immediately adjacent to the residence of Alex J. Garcia and Mary Garcia, will cause a diminution of the Garcias' property value.

"27. Location of a group home housing eight mentally retarded adult men at 150 South Rose Avenue, Akron, Ohio, resulted in a thirty-five (35) percent tax valuation reduction to the immediate neighboring property owned by Charles Zindle and Charlotte Zindle."

The conclusions of law of the trial court included the following:

"2. The defendant's, Siffrin Residential Association for the Developmentally Disabled of Stark County, proposed use of the premises located at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, as a 'family home' is not a 'family' within the meaning of Canton's Zoning Ordinances, effective February 14, 1977, and is not a permitted or conditional use in an R-2 zone.

"3. Amended Substitute Senate Bill No. 71, subsections (D) and (E), Ohio Revised Code Section 5123.18(D), (E), are

not 'general' laws of the State of Ohio within the meaning of Article XVIII, Section 3, of the Ohio Constitution.

"4. Canton's Zoning Ordinances are enacted pursuant to the constitutional grant of powers of local self-government, Article XVIII, Section 3; are not subject to the 'conflict' provision of Article XVIII, Section 3, of the Ohio Constitution; and are not superseded by Amended Substitute Senate Bill No. 71, subsections (D) and (E), Ohio Revised Code Section 5123.18(D), (E).

"5. Amended Substitute Senate Bill No. 71, subsections (D), (E) and (G), Ohio Revised Code Section 5123.18(D), (E), (G) are not uniform in their operation throughout the State of Ohio and are void as special laws prohibited by Article II, Section 26 of the Ohio Constitution.

"6. Amended Substitute Senate Bill No. 71, subsections (D) and (E), Ohio Revised Code Section 5123.18(D), (E), are unconstitutional and in violation of the due process clauses of Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution in that they are arbitrary and capricious."

Judgment was accordingly entered for the Garcias and the city of Canton. Siffrin, Drs. Moritz and Cannon, and the Ohio Legal Rights Service thereafter appealed the decision of the Court of Common Pleas to the Court of Appeals. The members of that court rendered their opinion and judgment in March 1979, reversing the judgment of the trial court.

The Court of Appeals found that the Siffron operation would be in compliance with the Canton ordinance, in that the facility and its residents could be considered a "family" under the ordinance because they would be "occupying a dwelling unit and living as a single housekeeping unit." Further, the court found that the trial court erred in finding that the establishment of the Siffrin home will occasion a diminution in the value of the Garcias' adjacent property.

The Court of Appeals further found that R.C. 5123.18(D) and (E) are general laws of the state of Ohio within the

meaning of Section 3, Article XVIII of the Ohio Constitution.

Further, the Court of Appeals held that the Canton zoning ordinance, being an exercise of the police power pursuant to Section 3, Article XVIII of the Ohio Constitution, is subject to the conflict provision of that section, and held that R.C. 5123.18 was not a "special" law, even though under subdivision (G) it excludes certain cities from the zoning overriding features of (D) and (E), and that such statute did have a uniform operation throughout the state, and was therefore not contrary to Section 26, Article II of the Ohio Constitution.

The Garcias and the city of Canton appeal to this court, setting forth the following propositions of law:

1. "The Siffrin Residential Association's proposed use of the residence at 1532 Yale Ave. N.W., Canton, Ohio, as a 'family home,' defined in O.R.C. Section 5123.18(A)(3), is not a 'family' use as defined in the Canton city ordinance and consequently is not a permitted use in an R-2 zoned district."

2. "Ohio Revised Code Sections 5123.18(D) and (E) are not 'general laws' of the state of Ohio within the meaning of Article XVIII, Section 3 of the Ohio Constitution."

3. "Canton's zoning ordinances are enacted pursuant to the constitutional grant of powers of local self-government, Article XVIII, Section 3; are not subject to the 'conflict' provision of Article XVIII, Section 3; and are not superseded by Ohio Revised Code Sections 5123.18(D) and (E)."

4. "Ohio Revised Code Sections 5123.18(D), (E) and (G) are void as special laws prohibited by Article II, Section 26 of the Ohio Constitution."

5. "Ohio Revised Code Sections 5123.18(D) and (E) are unconstitutional and in violation of the due process clauses of Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution."

6. "Ohio Revised Code Sections 5123.18(D) and (E) create an arbitrary and discriminatory classification of persons and

are unconstitutional under Article I of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

7. "Appellants Garcias are entitled to injunctive relief to prevent operation of the Siffrin Residential Association's 'family home' at 1532 Yale Avenue, N.W., Canton, Ohio pursuant to Ohio Revised Code Section 713.13."

8. "Application of the city of Canton's zoning ordinance to prohibit the proposed use of the Siffrin Residential Association's 'family home' in an R-2 district is a constitutional exercise of the city's police powers."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. Vincent J. Bernabei, for appellants Garcia.

Mr. Harry E. Klide, director of law, *Mr. Ronald E. Stocker, Mr. Thomas P. Albu* and *Mr. Thomas M. Bernabei,* for appellant city of Canton.

Zink, Zink & Zink Co., L.P.A., Mr. Jeffrey E. Zink, Mr. Larry A. Zink and *Ms. Constance Leistiko,* for appellee Siffrin.

Mr. William J. Brown, attorney general, and *Mr. George Stricker, Jr.,* for appellees Moritz and Cannon.

Mr. John Guendelsberger and *Mr. Douglas Rogers,* for appellee Ohio Legal Rights Service.

HOLMES, J. Upon a thorough review of the applicable constitutional provisions, the statutes under consideration, the record, transcripts of proceedings and briefs herein, we reverse the Court of Appeals.

We hasten to add at the outset of our discussion of the legal issues presented here that we are fully in sympathy with, and support of, the purposes of R.C. Chapter 5123 which are specifically set forth within R.C. 5123.67. It may not be reasonably questioned that there is considerable merit in a law which seeks to maximize the assimilation of mentally retarded persons into the ordinary life of the community in which they live, and to provide places for them to live in

surroundings and circumstances as close to normal as possible. However, in carrying out these salutory state programs in aid of some of our citizens, the constitutional rights of other members of our citizenry, and the constitutional authority which has been granted to our local governments, must always be guarded and not infringed upon.

In this cause we are not dealing with a state statute which attempts to override a discriminatory exercise of local governmental police power, nor are we indeed dealing with laws of the state which were enacted within the same public purpose area as are the local zoning laws. The state, by passage of R.C. 5123.18, was not seeking to establish a program of statewide land planning, but instead the state sought by this law to assist developmentally disabled persons by placing these persons in a residential setting. On the other hand, the city of Canton, through its zoning code, seeks to regulate land uses in order to develop the city through comprehensive community-wide planning. Here, the operation of this state law in carrying out the otherwise salutory aims of treating and educating the developmentally disabled obviates laws of local governments which have been enacted for an entirely different purpose, *i.e.*, the planned orderly growth of the community.

Here, based upon the facts within the record, some of which have been alluded to previously, we conclude that residents of these licensed facilities may not reasonably be includable within the definition of "family" as set forth in the Canton zoning code. We do not perceive this facility, and its statutorily mandated purposes and duties, to be likened to what is reasonably thought of to be a single housekeeping unit. We believe the facts show that these clients of Siffrin would not be residing in this dwelling unit as a single housekeeping unit in the same sense as would a group of individuals who had joined together in these premises in order to primarily share the rooming, dining and other

facilities. The emphasis in such an instance may be placed upon the dwelling aspect of the unit, and upon the fact that those who are living within that structure are sharing and maintaining a household as a single unit.

We conclude based upon all the evidence that the Siffrin facility would be established not for the prime purpose of eight people sharing a dwelling place, but primarily for the purpose of bringing together a group of developmentally disabled persons for their training and education in life skills, and for the establishment and furnishing of a professional plan of habilitation for each client developed by the licensed operator and implemented through the director of such facility and his staff of inter-disciplinary personnel trained and equipped for this purpose. The individualized care and training of these clients who are the resident participants of. this program would reasonably appear to be the basis of this program sought to be located at this site.

We do not believe that the operation of this facility constitutes a "family" within the definition of the Canton zoning code.

It being determined that the operation of this facility within the R-2 zoning district of Canton does not comport with the allowable activities for such a district in this community, the question becomes whether this state statute will prevail and override Canton's zoning laws. Municipalities in Ohio are granted the authority to adopt zoning regulations by way of the constitutional home rule provisions of Section 3, Article XVIII of the Ohio Constitution, which provides that:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This amendment has repeatedly been interpreted by this court as being a direct grant of authority to a municipality to enact local self-government and police regulations. *Village of*

Struthers v. Sokol (1923), 108 Ohio St. 263; *Youngstown v. Evans* (1929), 121 Ohio St. 342.

Whether the passage of zoning ordinances by municipalities constitutes an exercise of constitutionally granted local self-government or police powers presents an interesting question, but a question which in the main has been answered by prior judicial determinations. The Supreme Court of the United States has addressed this issue and held such an ordinance to be an exercise of the municipality's police powers. *Village of Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. This court peripherally addressed this subject in *State, ex rel. Euclid-Doan, v. Cunningham* (1918), 97 Ohio St. 130, where the court held that ordinances dealing with the regulation of height, mode of construction, and use of tenement houses were an exercise of police power. In *Pritz v. Messer* (1925), 112 Ohio St. 628, this court held that ordinances which divided the municipal territory into districts according to a comprehensive plan which was reasonably necessary for the preservation of the public health, safety and morals would be an exercise of the police power of the municipality.

In *State, ex rel. Toledo, v. Lynch* (1913), 88 Ohio St. 71, 97, this court characterized powers of local self-government as those "powers of government as, in view of their nature and the field of their operation, are local and municipal in character." In *State, ex rel. Toledo, v. Cooper* (1917), 97 Ohio St. 86, 91, this court additionally stated that such powers are "not only purely local and purely municipal, but purely governmental."

In a functional sense, zoning prescribes and regulates the conduct of individuals in their use of land. Zoning is not functionally a matter of internal municipal organization, as would be ordinances setting forth the form, structure and operation of the municipal government. Rather, the exercise of the zoning power " '***aims directly to secure and promote the public welfare, and it does so by restraint and

compulsion.' " *Fitzgerald v. Cleveland* (1913), 88 Ohio St. 338, 357.

Upon analysis of their function and purpose, we conclude that zoning ordinances are an exercise of the police power granted to municipalities by Section 3, Article XVIII of the Ohio Constitution.

Zoning ordinances may be valid and constitutional enactments pursuant to Section 3, Article XVIII, without the necessity of further state legislative enabling statutes. *Pritz v. Messer, supra.* Such laws, being of the nature of policing regulations of the municipality, unlike the municipality's exercise of its powers of "local self-government" which may be described as being of an administrative nature, are subject to the constitutional provision that they not be "in conflict with general law." *State, ex rel. Klapp, v. Dayton P. & L. Co.* (1967), 10 Ohio St. 2d 14; *Canton v. Whitman* (1975), 44 Ohio St. 2d 62.

There would seem to be no great controversy here that there is a direct conflict between the local zoning ordinance of Canton and R.C. 5123.18(D). May then this state statute override the Canton zoning ordinance by virtue of the statute being a general law? We think not.

"General laws" are defined to mean statutes setting forth police, sanitary or other similar regulations, and not statutes which by their operation only grant or limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations. *Village of West Jefferson v. Robinson* (1965), 1 Ohio St. 2d 113; *Youngstown v. Evans, supra.*

These "general laws" are laws operating uniformly throughout the state, *Leis v. Cleveland Railway Co.* (1920), 101 Ohio St. 162, which prescribe a rule of conduct upon citizens generally, and which operate with general uniform application throughout the state under the same circumstances and conditions. *Schneiderman v. Sesanstein* (1929), 121 Ohio St. 80. In the main, the provisions of R.C.

Chapter 5123 fall within the definition of a "general law" providing a method by which the mentally retarded may hopefully be acclimated to a useful place in society through the licensure of "residential facilities" and the deinstitutionalizing of these mentally retarded individuals. However, subsections (D), (E) and (G) of R.C. 5123.18 are not reasonably related to the valid purposes and objectives of the regulatory and licensing portions of the other sections of this chapter of law. In this attempt to be supportive of the purposes of this chapter, these sections unreasonably and unlawfully limit the enforcement by municipalities of certain of the police powers authorized by the Ohio Constitution to such municipalities.

It is interesting to note in this regard that subsections (E) and (F) of R.C. 5123.18 specifically preserve some enumerated city planning type of police powers to the municipalities in their control of these "licensed facilities." Subsection (E)(1) provides that the city may enact requirements for achitectural design, site layout, height of walls, screens and fences to be compatible with adjoining land uses and residential character of the neighborhood; subsection (E)(2) permits regulation of yard, parking and signs; subsection (E)(3) permits the limitation of "excessive concentration of homes." Subsection (F) provides that the section does not prohibit a political subdivision from applying to "residential facilities" regulations regarding health, fire and safety regulations, and building standards and regulations.

In the view of this majority, these sections of law selectively excise certain of the police powers of local government that have been granted to municipalities by the Constitution. Thus, such sections, like those considered in *Village of West Jefferson, supra,* are not general laws.

It is our view that subsections (D) and (E) of R.C. 5123.18, as limited by subsection (G) of that section, suffer an additional infirmity, in that they are special laws prohibited

by Section 26, Article II of the Ohio Constitution. Such constitutional provision states, in pertinent part, that, "all laws of a general nature shall have a uniform operation throughout the State***."

The requirement of uniform operation throughout the state of laws of a general nature does not forbid different treatment of various classes or types of citizens, but does prohibit nonuniform classification if such be arbitrary, unreasonable or capricious. *Miller v. Korns* (1923), 107 Ohio St. 287.

R.C. 5123.18(G) creates two distinct classes of municipalities with respect to the operation of subsections (D) and (E): first, municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed residential facilities by means of permitted uses, conditional uses, or special exception, so long as such ordinance remains in effect without any substantive modification; and, second, municipal corporations that did not have such a specific ordinance in effect on June 15, 1977. Those cities which acted prior to June 15, 1977, allowably under subsection (G), could have provided that these "family homes" be located only in the less restrictive residential disticts such as those districts permitting apartments, rooming houses, boarding houses, dormitories, and the like. Conversely, cities which did not act prior to June 15, 1977, are, under this subsection, required to permit these licensed facilities within any residential district including the most restrictive, single family districts. This classification is based upon a time requirement which is arbitrary in that it establishes June 15, 1977, as a deadline after which even enactment of an ordinance which would permit such licensed residential facilities in residential zones would not relieve a municipality from the effect of the statute.

Additionally, in complying with subsection (G), even though the city of Canton or other municipality had a zoning

ordinance in effect at the "deadline" date, which could reasonably be construed to permit facilities of the type in question within certain residential zones, if such ordinance did not *specifically* provide for these licensed residential facilities, the municipality would still come within the purview of the statute.

The desire of the state to make residential zones available to such facilities is a very laudatory one; however, any law enacted to accomplish such purpose must operate uniformly upon all municipalities. The distinction drawn between classes of municipalities by subsection (G) of R.C. 5123.18 is arbitrary and unrelated to the accomplishment of its avowed purpose. It frees some municipalities from state intervention in zoning, while subjecting others to spot zoning by administrative action. Furthermore, it fails to make provision for redemption of the right to exclude such facilities by enactment of remedial legislation after the arbitrary date.

Local option provisions in state statutes do not, *per se,* violate the requirement that all laws of a general nature shall have a uniform operation throughout the state. *Canton v. Whitman, supra.* However, R.C. 5123.18(G) should be carefully distinguished from the situation in *Whitman.* In *Whitman,* a municipal corporation could, pursuant to R.C. 6111.13, within a limited time period after enactment of the statute, hold a local election pertaining to fluoridation. In the instant cause, R.C. 5123.18 does not contain any local option provision, and it relates to a date prior to the enactment of the law. The arbitrary fixing of a retrospective date, upon which future rights and powers of a municipality depend, distinguishes this case from *Whitman.*

For these reasons, R.C. 5123.18(D), (E) and (G) are void under Section 26, Article II of the Ohio Constitution, as not being laws of a general nature having uniform operation throughout the state.

Local comprehensive zoning plans have long been held to be a valid exercise of governmental planning and control of land use for the benefit of public health, safety, morals, and general welfare. *Village of Euclid v. Ambler Realty Co., supra.* The various zoning provisions, which set forth certain prohibitions, restrictions, or limitations upon the free utilization and enjoyment of one's lands must be a part of a reasonably comprehensive plan for the development of the community. *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1; *Village of Euclid v. Ambler Realty, supra.*

A zoning ordinance shown to have a substantial relation to the public health, morals or safety, and not to be arbitrary or discriminatory in its operation or effect, will be upheld as a proper constitutional exercise of the police power of local government.

Here we find that the provision of the Canton zoning ordinance which would prohibit the establishment and operation of this residential facility within a R-2 zoned area is a reasonable exercise of the police power granted to municipalities pursuant to Section 3, Article XVIII of the Ohio Constitution.

The overall Canton zoning ordinance seemingly provides for a comprehensive plan for the growth and development of the city. It may be concluded that the specific section here involved has been enacted as a reasonable part of the overall zoning plan, and it has not been shown that such provision is arbitrary, capricious or discriminatory in its operation. We find that such section of the zoning ordinance does not forfeit an owner's rights or deprive him of the reasonable free use of his property. Accordingly, we hold that such section of the ordinance does not violate Section 19, Article I of the Ohio Constitution, nor the Fourteenth Amendment to the United States Constitution, and therefore we find the provision to be constitutionally valid.

There was evidence at the trial of this matter which tended

to show that the Garcias and other adjacent property owners would suffer a diminution in property valuation due to the operation of this residential facility in their neighborhood. The evidence in this regard was adduced both through the testimony of a real estate broker dealing in properties in this general vicinity, and by way of testimony of Mrs. Charlotte Zindle, an Akron resident, concerning the lowering of the valuation of her property when a like kind of facility had been established in her neighborhood in Akron.

To counter this evidence of appellants, Siffrin presented evidence from Ken Suchan, a resident of Wooster, an urban planner by profession, who testified that he had no personal experience in real estate sales, nor was he a real estate broker. He testified that, "***I wouldn't expect that there would be any difference, any change in—in property values as a result of—of that use being there; and it would, in fact, be almost indistinguishable from the rest of the neighborhood."

Even though the evidence of Mrs. Zindle may not have been probative of the issue of the lowering of real estate values in this Canton neighborhood due to the placement of this facility, the trial court, as trier of the facts, had before it probative evidence offered by both parties which the court could weigh and attribute an amount of significance or weight in determination of the preponderance thereof. The determination of the court found within finding of fact No. 26, *supra,* is in keeping with the evidence, and we hold that it was improper for the Court of Appeals to find that the trial court had erred in this respect.

The appellants assert their standing and right to injunctive relief in the instant matter pursuant to R.C. 713.13.[3] There

[3]"No person shall erect, construct, alter, repair, or maintain any building or structure or use any land in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation."

seems to be no real argument here that the Garcias do in fact have standing. This was acknowledged by the Court of Appeals. We conclude that all the elements of R.C. 713.13 have reasonably been met by the appellants in the presentation of their cause for injunctive relief. The Garcias are the "continguous" property owners and there was the "imminent threat" that the adjacent property would be utilized in a manner in violation of the zoning ordinance of Canton. Further, it was shown to the satisfaction of the trier of the facts that the Garcias would be "especially damaged" by the placement of this facility adjacent to their residence. Thus, the Garcias did show that they were entitled to the injunctive relief requested.

Based upon all the foregoing, R.C. 5123.18(D), (E) and (G) are hereby held to be unconstitutional. Further, we hold that the provisions of Canton City Code Chapter 1137, insofar as such provides for "R-2 two-family dwellings" that would by their application prohibit the establishment of "licensed residential facilities" in such a district, constitute a constitutional enactment of the city of Canton.

The judgment of the Court of Appeals is hereby reversed.

Judgment reversed.

CELEBREZZE, C.J., HERBERT, W. BROWN and SWEENEY, JJ., concur.

LOCHER, J., concurs in the judgment.

P. BROWN, J., dissents.

PAUL W. BROWN, J., dissenting. For the reasons more fully delineated in my dissent in *Carroll v. Washington Twp.* (1980), 63 Ohio St. 2d 249, I must disagree with the majority's resolution of this cause. The majority in the instant case has again unnecessarily intruded into internal family relations in concluding that a "family home" as defined by R.C. 5123.18(A)(3) is not a family use under the applicable zoning

ordinance. Canton zoning ordinance section 1123.30 provides:

" 'Family' means one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, lodging house, motel, hotel, fraternity or sorority house."

Under this broad definition I cannot conclude that the planned home for these developmentally disabled adults would not constitute a family. The majority seems to base its findings upon the premise that under the zoning ordinances the primary purpose for living as a single housekeeping unit must be to share the rooming, dining and other facilities within the dwelling. This requirement, however, appears nowhere within the zoning scheme. So long as the group functions as a single housekeeping unit, their primary purpose in doing so is irrelevant.

The requirement also makes little sense as a judicially created doctrine. Other courts have wisely not seen fit to intrude into the motivations behind the free choice of individuals who seek to live together as single housekeeping unit and create such artificial distinctions, with their attendant possibilities of discriminatory application. *E.g., Des Plaines v. Trottner* (1966), 34 Ill. 2d 432, 216 N.E. 2d 116; *White Plains v. Ferraioli* (1974), 34 N.Y. 2d 300, 313 N.E. 2d 756. More specifically the courts that have addressed the issue presented here, group homes for retarded adults, have concluded that the homes are single housekeeping units. *Freeport v. Association for the Help of Retarded Children* (1977). 94 Misc. 2d 1048, 406 N.Y. Supp. 2d 221; *Oliver v. Zoning Commission* (1974), 31 Conn. Supp. 197, 326 A. 2d 841 (where a group home for nine retarded adults was held to constitute a single housekeeping unit, under an almost idential definition of family as that appearing in the Canton ordinances).

Moreover it does not seem so obvious that the individuals who seek to live together here do so primarily to obtain "training and education in life skills." Such training is just as available in institutions whose environment the individuals in this cause have purposely avoided. The primary purpose of these individuals is more likely the avoidance of institutionalization, thus seeking to live in a shared dwelling in a residential neighborhood, in the midst of surroundings as normal as possible.

In *Carroll v. Washington Twp., supra,* a case announced this date, it was held that the Ohio Youth Commission's foster home was not a "one family residential dwelling unit." In that case the court stressed the fact that there was no definition of the term "family" contained within the zoning provisions. The court indicated that if the legislative definition could be met it would uphold such a residential use. Yet, in this case, the majority has concluded that the zoning definition focusing upon a single housekeeping unit will not permit the family home sought to be created under R.C. Chapter 5123. Thus, the line to be drawn has conveniently moved in a manner to exclude the family homes, which have been deemed to be so desperately needed. If such a trend should continue the only place for such homes may be factory districts and other non-residential areas. Thus, I conclude as the Court of Appeals did in this cause that the Siffrin home is a permitted use within this R-2 district.

I also do not agree with the majority's home-rule analysis concerning general laws. That opinion concedes the merit inherent in this legislation, but finds itself unable to uphold the constitutionality of R.C. 5123.18(D) and (E). A review of this court's prior law dealing with this subject, however, leads me to the contradictory conclusion that these provisions are part of a comprehensive licensing scheme and as such constitute portions of a general law.

In *Village of West Jefferson v. Robinson* (1965), 1 Ohio St. 2d 113, this court established the definition of "general laws" stating in paragraph three of the syllabus that:

"The words 'general laws' as set forth in Section 3 of Article XVIII of the Ohio Constitution means statutes setting forth police, sanitary or similar regulations and not statutes which purport *only* to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations." (Emphasis added.) See, also, *Youngstown v. Evans* (1929), 121 Ohio St. 342, 345.

If the provisions at issue can be fairly characterized as being designed *only* to prescribe the mode and manner in which municipalities must conduct their zoning, they must be struck down as depriving those local governmental bodies of their constitutionally granted authority. R.C. 5123.18(D) and (E), however, do not merely place limits on municipalities, but in a much greater sense are regulatory of this state's citizenry in a licensing context.

Subsections (A) through (C) of R.C. 5123.18 set up a definitional and procedural framework under which a residential facility may be licensed. Subsections (D) and (E) govern the conduct of individuals. Both of these latter provisions begin with the statement that "[a]ny person may operate a [state] licensed***home," and, in fact the focus of the entire statutory section is upon individuals who seek to establish the group homes at issue.

The majority relies heavily upon the case of *Village of West Jefferson v. Robinson, supra,* in reaching its conclusion that the provisions at issue are not general laws. That case, involving a village that imposed a greater fine for unauthorized peddling than was permitted in the Revised Code, however, is not germane to the instant cause. No state licensure scheme was directly involved there.

On at least five previous occasions this court has held state licensing measures to be general laws. In *Neil House Hotel v.*

Columbus (1944), 144 Ohio St. 248, regulations of the state Board of Liquor Control governing hours of operation were upheld over a Columbus ordinance. State laws authorizing licensing of watercraft and creating a fee schedule, were upheld over a local ordinance in *State, ex rel, McElroy v. Akron* (1962), 173 Ohio St. 189. In *Anderson v. Brown* (1968), 13 Ohio St. 2d 53, this court ruled that a municipality could not require an additional license for trailer parks where a state statute governed such licenses and provided that they "shall be in lieu of all license and inspection fees***." State laws authorizing the licensing and regulation of bingo operations were upheld over a conflicting municipal ordinance in *Lorain v. Tomasic* (1979), 59 Ohio St. 2d 1. See, also, *Stary v. Brooklyn* (1954), 162 Ohio St. 120.

The case, however, which is most analogous to this cause is *Auxter v. Toledo* (1962), 173 Ohio St. 444. There, the state liquor control licensing statute, R.C. 4303.27, providing that, "[e]ach permit issued***shall authorize the person named to carry on the business specified at the place***described***," was upheld over a Toledo ordinance prohibiting the sale of beer without a city license. It involved the same type of legislative grant at issue here, the affirmative right of a state agency to solely govern the carrying out of a particular use at a specific location. The statute at issue in *Auxter* was held to be a general law. Surely this is the proper conclusion, because the General Assembly may in the licensing context do more than grant the license holder a promise of no future interference from the state. Further interference by a municipality may be safeguarded against, under a specific legislative grant permitting a particular use at a specific location governed by a state agency. To hold otherwise, as the majority has done, is to in effect handcuff the General Assembly so that it may not create areas of statewide licensing which are exempt from local municipal control.

In R.C. 5123.67, the General Assembly specifically set forth the purposes for the enactment of the statutory provisions at issue. That statute provides:

"Chapter 5123 of the Revised Code shall be liberally interpreted to accomplish the following purposes:

"(A) To promote the human dignity and to protect the constitutional rights of mentally retarded persons in the state;

"(B) To encourage the development of the ability and potential of each mentally retarded person in the state to the fullest possible extent, no matter how severe his degree of disability;

"(C) To promote the economic security, standard of living, and meaningful employment of the mentally retarded;

"(D) To maximize the assimilation of mentally retarded presons into the ordinary life of the communities in which they live;

"(E) To recognize the need of mentally retarded persons whenever care in a residential facility is absolutely necessary, to live in surroundings and circumstances as close to normal as possible."

R.C. 5123.18(D) and (E) are integral parts of the legislative goal of deinstitutionalization, which may be carried out effectively only through the use of group homes.

The majority has thwarted this goal by reading subsections (D) and (E) in a vacuum without reference to the remainder of R.C. 5123.18, governing licensing, or the remainder of this statutory chapter. Through such a chosen pattern of interpretation, the majority has impliedly found some rationale to distinguish the instant situation from this court's prior line of cases concerning licensing. Perhaps some hidden policy reason requires the exemption of state liquor licenses from local municipal control but not the family home sought to be established here. Because I cannot also conceive of this policy consideration, I must dissent from the majority's determination that R.C. 5123.18(D) and (E) are not general laws.

Due to my conclusion that the contested provisions are general laws, I would find them to allow the operation of the Siffrin home. This court stated in *Canton v. Whitman* (1975), 44 Ohio St. 2d 62, at page 66, that:

"The city may exercise the police power within its borders, but the general laws of the state are supreme in the exercise of the police power, regardless of whether the matter is one which might also properly be a subject of municipal legislation. Where there is direct conflict the state regulation prevails." Accord *Columbus v. Teater* (1978), 53 Ohio St. 2d 253.

The majority's holding that subsections (D) and (E) of R.C. 5123.18, as limited by subsection (G) of that statutory section, constitute "special laws" is also unjustified. The conclusion reached that these provisions do not have uniform application flies in the face of the substance of the statute. No single area or type of municipality is singled out, as the statute's mandate is statewide. In *State, ex rel. Stanton, v. Powell* (1924), 109 Ohio St. 383, at page 385, this court recognized that:

"***Section 26, Art. II of the Constitution, was not intended to render invalid every law which does not operate upon all***political subdivisions within the state.***[T]he law is equally valid if it contains provisions which permit it to *operate upon every locality where certain specified conditions prevail.*" (Emphasis added.)

R.C. 5123.18(G) merely creates a grandfather clause whereby those municipalities that had pre-existing zoning codes on June 15, 1977, which would specifically allow this type of family home are unaffected by this statute. Grandfather clauses of this type have undisputedly been held valid in other contexts. How R.C. 5123.18(G), which provides that subsections (D) and (E) are redundant and inapplicable where such facilities are already licensed and regulated by local ordinance, adversely affects any municipality is not demonstrated. Simply because some

municipalities fall on one side or the other of a valid legislative cut-off does not mean that the cut-off is unreasonable, or that the statute is a "special law" within the meaning of Section 26, Article II of the Ohio Constitution. In *State, ex rel. Lourin, v. Indus. Comm.* (1941), 138 Ohio St. 618, at page 623, it was stated:

"***[T]he law abounds with situations where a difference of a minute may work a great change in rights and liabilities. Any statute of limitations illustrates this. In the interest of administrative workability, or to effect gradations in legislative policy, certain definite markers must be established,***. *It is, of course, for the Legislature to determine just where such boundaries shall be set.*" (Emphasis added.)

Certainly, the allowance of procedural alternatives effectuating the purposes of R.C. 5123.18 does not prevent the statute from having uniform operation throughout the state.

For the foregoing reasons, I would affirm the Court of Appeals in all respects.

Case No. 4969, 4971, 4972

COURT OF APPEALS OF STARK COUNTY, OHIO

Alex J. Garcia and Mary Garcia
and The City of Canton,
Plaintiffs-Appellees,

vs.

Siffrin Residential Association for the
Developmentally Disabled of Stark County

Dr. Timothy P. Moritz
Director, Department of Mental Retardation

Dr. Levester Cannon
Commissioner, Division of Mental Retardation and
Developmental Disabilities Department of Mental
Health and Mental Retardation

William J. Brown, Attorney General
State of Ohio and

Ohio Legal Rights Service
Defendants-Appellants.

OPINION

Filed March 7, 1979

Mr. Larry A. Zink, Counsel for Siffrin Residential Association; Mr. Thomas M. Bernabei, Counsel for Alex and Mary Garcia; Mr. Harry E. Klide, Mr. Ronald E. Stocker and Mr. Thomas B. Albu, Counsel for City of

Canton; Mr. George Stricker, Jr., Counsel for Dr. Timothy P. Moritz, Dr. Levester Cannon and William J. Brown, Attorney General; Mr. John Guendelsberger, Counsel for Ohio Legal Rights Service.

Brown, J. Defendant-appellant, Siffrin Residential Association for the Developmentally Disabled of Stark County, appeals from a final judgment of the Stark County Common Pleas Court, in two declaratory judgment and injunction actions, declaring all of R.C. 5123.18 unconstitutional and ordering a permanent injunction issued against Dr. Timothy Moritz, Director, Department of Mental Health and Mental Retardation, and Dr. Levester Cannon, Commissioner, Division of Mental Retardation and Developmental Disabilities, Department of Mental Health and Mental Retardation, to prohibit them from issuing a license to the defendant, Siffrin Residential Association, to operate a "family home" at 1532 Yale Avenue, N.W., Canton, Ohio. This family home was proposed to care for eight or fewer retarded female adults.

These final judgments resulted from the following two separate actions, consolidated for trial and for appeal purposes. Plaintiffs Alex and Mary Garcia, owners of adjacent real estate, filed an action seeking an injunction restraining defendants Moritz and Cannon from issuing a license pursuant to R.C. 5123.18 to the defendant Siffrin for a "family home" at the Yale Avenue address above, and for a declaratory judgment declaring subsection (D) of R.C. 5123.18 unconstitutional. The City of Canton filed a separate legal action seeking the same relief.

Defendant-appellant Siffrin sets forth eleven separate assignments of error. The first and fifth assignments of error, which we will consider together, allege that the trial court erred in finding that under the Canton City Ordinances, a "family" is defined as "one or more persons occupying the dwelling unit and living as a single housekeeping unit,

whether or not related to each other by birth or marriage, and who do not pay consideration for living there and who do not have an 'operator' running the dwelling," and in concluding that the Siffrin home is not a permitted or conditional use in an R-2 zone because the residents of the home do not constitute a family within the above definition.

Whether the Siffrin home is permitted by the Canton zoning ordinances, requires interpretation of the following applicable provisions:

> " 'Family' means one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage as distinguished from a group occupying a boarding house, lodging house, motel, hotel, fraternity or sorority house." Ordinance No. 1123.30
>
> " 'Dwelling' means any building or portion thereof which is designed for or used for residential purposes; including one or two family and multi-family, but not including a tent, tourist cabin, trailer, trailer coach, hotels, motels, boarding houses or lodging houses." Ordinance No. 1123.24.
>
> " 'Dwelling unit' means a group of rooms arranged, maintained or designed to be occupied by a single family (See definition of Family), and consists of a complete bathroom, complete kitchen or kitchenette, and facilities for living, sleeping and eating. All of the facilities are to be located in contiguous rooms and used exclusively by such family and used by any authorized persons occupying such dwelling unit with the family." Ordinance No. 1123.25.

The Siffrin home falls within the meaning of the terms "dwelling" and contains two "dwelling units," as defined in Sections 1123.24 and 1123.25. The residence is a two-story, two-family brick home with two bedrooms and kitchen facilities on each floor. It has no exterior modifications to distinguish it from any other residence in the 1500 block of Yale Avenue.

Residents of the Siffrin home are a "family" because they will live as a "single housekeeping unit" within the meaning of Section 1123.30. The adult retarded female residents will, as a group, do grocery shopping, plan menus, and cook their meals. They will have assigned household duties in the kitchen and elsewhere in the house, and will do exterior home maintenance. The home will be staffed by two full time houseparents and part time relief staff, and will be administered by a full time director.

Nonetheless, appellees Garcias contend that the residents of the Siffrin home constitute "boarders" or "lodgers," rather than a "family." The Canton City Ordinances define a "boarder" as "a transient or nontransient person who is not a member of the family, not related* * *to the operator of the house." A "boarding house" is defined as a building wherein rooms are used "for the purpose of providing sleeping accommodations to persons for consideration." The Garcias contend that the residents of the Siffrin home will pay consideration to the "operator" of the Siffrin home in order to live there. However, the Siffrin residents are members of a family; moreover, the home will provide more than sleeping accommodations in exchange for consideration to its residents. We find that the Siffrin home is not, in letter or spirit, within the zoning concept of a boarding house.

The proposed use of the Siffrin home is a use permitted in the R-2 district of the City of Canton. Cf. Driscoll v. Goldberg, 73 CA 59 (Mahoning County Court of Appeals, 1974); Carroll v. City of Miami Beach (Fla. App. 1967), 198 S. 2d 643; City of White Plains v. Ferraioli (1974), 34 N.Y. 2d

300, 313 N.E. 2d 756, 357 N.Y.S. 2d 449.

Accordingly, defendant Siffrin's first and fifth assignments of error are well taken and alone are sufficient for this Court to reverse the Common Pleas Court judgment and grant appropriate relief to Siffrin to operate the home for retarded female adults.

However, in accordance with the mandate of App. R. 12(A), we will consider and decide the remaining assignments of error. Our disposition of the remaining assignments of error will not affect the judgment of reversal we must make because assignments of error Nos. 1 and 5 are well taken.

Defendant Siffin, in its second assignment of error, contends that the trial court erred in finding that the establishment of the Siffrin home will cause a diminution in value of the Garcias' adjacent property.

We agree, and find the second assignment of error well taken.

The testimony produced by plaintiffs through the real estate broker, Cedric Guest, revealed that he did not formulate a probative expert opinion as to the effect of the Siffrin home on neighborhood real estate values.[1] Likewise, the testimony of plaintiff Alex Garcia had no probative significance on the issue of diminution in the Garcia's property value.

Defendant's expert witness, Ken Suchan, an experienced urban planner, testified that the proposed Siffrin home would not make any change or differnce in market values. Unlike Guest, Suchan had made a thorough, detailed study of the Siffrin home at 1532 Yale Avenue, the density of the neighborhood, and the purpose and function of the Siffrin home; had studied a similar Siffrin home operation in Jackson Township, Stark County; had examined several research studies of impact of family or group homes upon property values, which studies concluded that family or group homes had no effect upon property values; and

testified specifically that the Siffrin home would have no effect upon plaintiffs' adjacent real estate.

In its third assignment of error, Siffrin alleges that the trial court erred in finding that location of a group home housing eight mentally retarded adults at 150 South Rose Avenue, Akron, Ohio, resulted in a thirty-five (35) percent tax valuation reduction to the immediate neighboring property owned by Charles Zindle and Charlotte Zindle. We find this assignment of error not well taken. The trial court's finding is supported by the record. However, this fact, involving an Akron residence, in another county, has no probative value and is irrelevant to the issues in the case sub judice. It cannot operate to prevent a judgment in favor of the defendant Siffrin.

In its fourth assignment of error, Siffrin alleges that the trial court erred in concluding that Garcias have standing, pursuant to R.C. 713.13, to obtain an injunction in the instant matter. We find this assignment of error not well taken. Plaintiffs Mary and Alex Garcia have standing pursuant to R.C. 713.13 to institute this injunction action. Standing sufficient to create a right in plaintiffs to institute an action is distinct and apart from the right of such plaintiffs to obtain injunctive relief. To have standing to sue, plaintiffs need only claim that there has been an imminent threat of violation of the zoning ordinance and that plaintiffs will suffer "especial damages." Thereafter, the right to injunctive relief depends upon the application of the principles of equity and to the rules pertaining to injunctive relief to the facts of the case. The plaintiffs, who have standing in this case, may well be without a right to injunctive relief.

In assignment of error No. 6, Siffrin alleges that the trial court erred in concluding that R.C. 5123.18(D) and (E) are not "general laws" within the meaning of Article XVIII, Section 3, Ohio Constitution. We find this assignment of error well taken.

R.C. 5123.18(D) and (E)[2] are general laws of the State of Ohio within the meaning of Article XVIII, Sec. 3, Ohio Constitution.[3] General laws are state statutes and regulations pursuant thereto, which prescribe a rule of conduct for citizens generally, and which operate with general, uniform application throughout the state under the same circumstances and conditions. Schneiderman v. Sesanstein (1929), 121 Ohio St. 81, 82; Leis v. Cleveland Ry. Co. (1920), 101 Ohio St. 162; Gordon v. State (1889), 46 Ohio St. 607, 627. Cf. Canton v. Whitman (1975), 44 Ohio St. 2d 62; State, ex rel. Klapp v. Dayton Power & Light Co. (1967), 10 Ohio St. 2d 14.

R.C. 5123.18 falls within the foregoing definition of general law and does so by addressing itself to the statewide problem of deinstitutionalizing mentally retarded individuals through a statewide application of licensing residential facilities for those with developmental disabilities.

In its seventh assignment of error, Siffrin alleges that the trial court erred in concluding that the Canton zoning ordinances are not subject to the "conflict" provision of Article XVIII, Section 3, Ohio Constitution, and are not superseded by R.C. 5123.18(D) and (E). We find this assignment of error well taken. The Canton zoning ordinances, enacted pursuant to the grant of powers of local self-government, Article XVIII, Section 3, Ohio Constitution, are subject to the conflict provision of that section, and such zoning laws are therefore superseded and limited by R.C. 5123.18(D) and (E).

Any municipal ordinance, including zoning ordinances, enacted by a city in the exercise of its powers of local self-government and local police powers, which is at variance with the state police power, is invalid under Section 3, Article XVIII, Ohio Constitution. Leavers v. City of Canton (1964), 1 Ohio St. 2d 33; State, ex rel. Arey v. Sherrill (1944), 142 Ohio St. 574; Village of Struthers v. Sokol (1923), 108 Ohio

St. 263; Cleveland Telephone v. City of Cleveland (1918), 98 Ohio St. 358; Sun Oil Company v. City of Upper Arlington (1977), 55 Ohio App. 2d 27.

In its eighth assignment of error, Siffrin alleges that the trial court erred in concluding that R.C. 5123.18(D), (E), and (G)[4] are not uniform in their operation throughout the state, and are void as special laws prohibited by Article II, Section 26, Ohio Constitution, which provides that,

> "All laws, of general nature, shall have a uniform operation throughout the state;* * *"

We find this assignment of error well taken.

Appellees Garcias allege that R.C. 5123.18(G) is a "special" law in that it excludes certain municipalities from the operation of R.C. 5123.18(D) and (E). We find that the local option provision does not preclude the uniform operation of R.C. 5123.18, but merely provides an alternate means of local regulation of those residential facilities for the developmentally disabled which are established pursuant to R.C. 5123.18. R.C. 5123.18(D) and (E) provide that such facilities shall be a permitted use in residential zones, and list the ways in which such facilities may be regulated by local ordinance. R.C. 5123.18(G) provides that if such facilities are already licensed and regulated by local ordinance, subsections (D) and (E) are redundant and inapplicable. The existence of procedural alternatives for effectuating the purposes of R.C. 5123.18 does not prevent that statute from having uniform operation throughout the state.

In its ninth assignment of error, Siffrin alleges that the trial court erred in concluding that R.C. 5123.18(D) and (E) are unconstitutional and in violation of the due process clauses of the Ohio Constitution and the United States Constitution in that the statutes are arbitrary and capricious. We find this assignment of error well taken. The enactment of R.C. 5123.18(D) and (E) was an exercise of state police power

which bears a real and substantial relation to public health, and these sections are, therefore, constitutional.

In its tenth assignment of error, Siffrin alleges that the trial court erred in concluding that R.C. 5123.18(D) and (E) create an arbitrary and discriminatory classification of persons and are unconstitutional under the Ohio Constitution and the United States Constitution. Appellees Garcias allege discrimination in that they, as property owners, are denied their right to use, sell or lease their property to groups of eight or fewer persons without developmental disabilities, and are themselves denied the same right to live in groups of eight adults should they so choose. As R.C. 5123.18(D) and (E) contain no prohibition against any use of property, we find this assignment of error well taken.

In its eleventh assignment of error, Siffrin alleges that the trial court disregarded well established legal principles in deciding the constitutionality of R.C. 5123.18. We find this assignment of error well taken. The trial court's decision that R.C. 5123.18(D), (E) and (G) are unconstitutional disregards several elementary principles of constitutional construction. In construing a statute, the court must resolve every reasonable doubt in relation to such statute in favor of the validity of that statute. State, ex rel. Lukens v. Brown (1973), 34 Ohio St. 2d 257; State, ex rel. Jackman v. Court of Common Pleas (1967), 9 Ohio St. 2d 159; State, ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142; City of Xenia v. Schmidt (1920), 101 Ohio St. 437.

Also, as contended by defendant Siffrin, it was error and contrary to law for the trial court to declare the entire statute, R.C. 5123.18, unconstitutional when plaintiffs sought in their prayer for relief to have only paragraphs (D), (E) and (G) of R.C. 5123.18 declared unconstitutional.

Defendant-appellant Ohio Legal Services advances six separate assignments of error; assignments of error Nos. 1, 3, 4, 5 and 6[5] were included in the assignments of error

advanced by defendant-appellant Siffrin and have been already resolved in this opinion. The second assignment of error of defendant Ohio Legal Services in part contains additional contentions. The second assignment of error states:

> "THE LOWER COURT ERRED IN EXCLUDING THE PROPOSED HOME FROM THE R-2 ZONING DISTRICT BECAUSE SUCH AN INTERPRETATION AND APPLICATION OF THE CANTON ZONING ORDINANCE WOULD VIOLATE SECTIONS 1, 16, AND 19 OF ARTICLE I OF THE OHIO CONSTITUTION, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND CHAPTER 4112, OHIO REVISED CODE."[6]

This assignment of error is well taken. The Canton zoning law applied to prohibit the Siffrin home in an R-2 district is unconstitutional. Article I, Section 19, limits the exercise of police powers, including zoning regulations, to that which has a substantial relation to the public health, morals, safety or public welfare. Youngstown v. Kahn Bros. Building Co. (1925), 112 Ohio St. 654. A zoning ordinance which forfeits an owner's rights or deprives the owner of the free use of his property, or which is unreasonably applied to exclude an institutional home in a residential neighborhood, violates Article I, Section 19, Ohio Constitution. State, ex rel. Synod of Ohio v. Joseph (1942), 139 Ohio St. 229. Cf. Women's Kansas City St. Andrew Soc. v. Kansas City (8th Cir. 1932), 58 F. 2d 593; Village of University Hts. v. Cleveland Jewis Orphans' Home (6th Cir. 1927), 20 F. 2d 743.

Contrary to contentions of defendant Ohio Legal Services, R.C. Chapter 4117, which prohibits discriminatory housing

practices, is inapplicable to the issues in this case and does not apply to plaintiffs, the Garcias or the City of Canton.

The City of Canton does not have a police power which is either superior to or independent of the police power of the State of Ohio. Police power is a power that inheres only in the sovereign. Municipalities are not independent sovereignties and can exercise only such police power as the sovereign people of this state have in the Ohio Constitution delegated to them, and these powers must be exercised in the manner and form the constitution provides. Cleveland Telephone Co. v. City of Cleveland, supra.

Defendants-appellants Moritz and Cannon advance seven assignments of error. Assignments of error Nos. 1, 2 with four subheadings, 3, 4, 5 and 7 are repetitions of errors assigned by defendant Siffrin and have been resolved in this opinion. These assignments of error as numbered are well taken.

Appellants Moritz and Cannon advance a new assignment of error, No. 6, as follows:

> "The Trial Court Erred in Enjoining Appellants Moritz and Cannon From Issuing A License To Appellant Siffrin Since Such License Had Already Been Properly Issued In Accordance With A.S.B. 71, Ohio Revised Code Section 5123.18(C) Prior To Any Proper Court Action By The Appellees."

Appellant Cannon, Commissioner of Mental Retardation, issued a family home license to appellant Siffrin for the 1532 Yale Avenue home on April 21, 1978. At this time he had no actual notice that the trial court had issued a temporary restraining order. Commissioner Cannon had made written findings concerning the comments and objections he had received, in accordance with R.C. 5123.18(C),[7] and had fully complied with paragraph (C) in all respects.

The complaint was filed in Stark County Common Pleas Court on April 21, 1978, and a temporary restraining order obtained the same date.

Since service of process and notice of the temporary restraining order was made on appellants Cannon and Moritz after issuance of the license to Siffrin, the temporary restraining order was of no force and effect. The abortive temporary restraining order did not comply with Civ. R. 65(A).

A trial court has no power to issue a permanent injunction enjoining public officials, such as Cannon and Moritz, from issuing a license which already has been properly issued. Equity cannot enjoin that which has been accomplished. Broadway Properties, Inc. v. Crouch (1961), 114 Ohio App. 30, 38. The sixth assignment of error of appellants Cannon and Moritz is therefore well taken.

Therefore, the judgment of the Stark County Common Pleas Court is reversed, at the costs of plaintiffs-appellees, and coming to enter the judgment which the Common Pleas Court should have rendered, it is ordered, adjudged and decreed that the permanent injunction prohibiting Siffrin Residential Association from operating a family home at 1532 Yale Avenue, N.W., Canton, Ohio, be, and it hereby is, dissolved and the complaints of plaintiffs dismissed; that R.C. 5123.18, be, and it hereby is, declared constitutional in its entirety; and that the permanent injunction enjoining defendants Dr. Timothy B. Moritz, Director, Department of Mental Health and Mental Retardation, and Dr. Levester Cannon, Commissioner of the Division of Mental Retardation and Developmental Disabilities, Department of Mental Health and Mental Retardation, from issuing a license to Siffrin Residential Association for the Developmentally Disabled of Stark County, to operate a family home at 1532 Yale Avenue, N.W., Canton, Ohio, be, and same hereby is, dissolved. This cause is remanded to the

Stark County Common Pleas Court for execution of this judgment and for costs.

/s/ John W. Potter
/s/ Clifford T. Brown
/s/ John J. Connors, Jr.

Connors, J. I reluctantly concur as I did in Adams v. Toledo City Plan Commission, Sixth District Court of Appeals, unpublished opinion, C.A. No. L-78-006, decided August 18, 1978. I disagree with the principles set forth in recently enacted legislation defining what constitute a "family," and the case law which has flowed from the interpretation of this type of statute throughout the country. In effect, based on these statutes and holdings, the concept of what constitutes a "family" in former times has been totally destroyed. Nevertheless, it is not the province of the courts to enact legislation, but to interpret it, whether it be federal, state, or local. Based on the arguments, facts and the law in the case sub judice, I am bound to concur in the judgment of this Court.

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[1]The gist of the Cedric Guest opinion concerning effect of the Siffrin home on realty value was as follows:

"I wouldn't say the exact type of operation you are speaking of would make a change but anything that was a change from the norm of the homesteads on that street would have some bearing on prices of homes in that area."

On cross-examination Guest further testified as follows:

"Q. What did you know about the Siffrin home prior to today?

"A. Very little, only what was in the newspapers two or three weeks ago.

"* * *

"Q. There is a six unit apartment near Mr. Garcia's home, is that correct?

"A. I'd say about four or five doors south of the home, yes, I think its about that many.

"Q. Does this six unit apartment have any depressing effect on the neighborhood in terms of value?

"A. It would be a factor, yes.

"* * *

"A. Its a mixed rental neighborhood presently, yes, * * *.

"Q. Did you use a cost approach or market data approach* * *in formulating your opinion?
"A. * * *Only time would I make a cost approach or market approach is on a written opinion of value. I was not asked.
"Q. You didn't consider any comparable sales?
"A. Definitely not.
"* * *
"Q. Have you yourself done any studies on the effect of family homes for retarded?
"A. No, that is something so new, * * *."

[2]Sec. 5123.18, paragraphs (D) and (E) provide:
"(D) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are uniformly imposed upon all single-family residences within the district or zone.
"(E) Any person may operate a licensed group home as a permitted use in any multiple-family residential district or zone of any political subdivision, except that a political subdivision that has enacted a zoning ordinance or resolution establishing planned unit development districts may exclude group homes from such districts, and a political subdivision that has enacted a zoning ordinance or resolution may regulate group homes in multiple-family residential districts or zones as a conditionally permitted use or special exception, in either case, under reasonable and specific standards and conditions set out in the zoning ordinance or resolution to:
"(1) Require the architectural design and site layout of the home and the location, nature, and height of any walls, screens, and fences to be compatible with adjoining land uses and the residential character of the neighborhood;
"(2) Require compliance with yard, parking, and sign regulation;
"(3) Limit excessive concentration of homes."

[3]Article XVIII, Section 3, Ohio Constitution provides:
"3. Powers. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such police, sanitary and other similar regulations, as are not in conflict with general laws."

[4]R.C. 5123.18(G) provides:
"(G) Divisions (D) and (E) of this section are not applicable to municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed residential facilities by means of permitted uses, conditional uses, or special exception, so long as such ordinance remains in effect without any substantive modification."
See footnote [3] for paragraphs (D) and (E) of Sec. 5123.18.

[5]"I. THE LOWER COURT ERRED IN CONSTRUING THE CANTON ZONING ORDINANCE TO EXCLUDE THE PROPOSED HOME FROM

THE R-2 ZONING DISTRICT BECAUSE THE PROPOSED HOME IS WITHIN THE DEFINITION OF 'FAMILY' CONTAINED IN THE CANTON ZONING ORDINANCE.

"III. THE LOWER COURT ERRED IN HOLDING THAT CANTON'S ZONING ORDINANCES ARE NOT SUBJECT TO THE CONFLICT CLAUSE OF ARTICLE XVIII, SECTION 3, OF THE OHIO CONSTITUTION AND ARE NOT SUPERSEDED BY SECTION 5123.18, OHIO REVISED CODE.

"IV. THE LOWER COURT ERRED IN HOLDING THAT SECTION 5123.18, OHIO REVISED CODE, IS NOT A 'GENERAL LAW' OF THE STATE OF OHIO WITHIN THE MEANING OF ARTICLE XVIII, SECTION 3, OF THE OHIO CONSTITUTION.

"V. THE LOWER COURT ERRED IN HOLDING THAT SECTION 5123.18, OHIO REVISED CODE, CREATES AN ARBITRARY AND DISCRIMINATORY CLASSIFICATION OF PERSONS IN VIOLATION OF ARTICLE I OF THE OHIO CONSTITUTION AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

"VI. THE LOWER COURT ERRED IN HOLDING THAT SECTION 5123.18, OHIO REVISED CODE, VIOLATES ARTICLE II, SECTION 26, OF THE OHIO CONSTITUTION."

[6]Article I, Section 1, Ohio Constitution, provides:

"Right to freedom and protection of property.

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Article I, Section 16, Ohio Constitution, provides:

"Redress in courts.

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.* * *"

Article I, Section 19, Ohio Constitution, provides:

"Private property shall be ever held inviolate but subservient to the public welfare.* * *"

[7]R.C. 5123.18(C) provides, in part, as follows:

"(C) The chief of the division of mental retardation and developmental disabilities shall license and inspect the operation of residential facilities and may renew and revoke such licenses. A license is valid for one year from the date it is issued or renewed. Before issuing or renewing a license, the chief of the division or his designee shall inspect each residential facility for which application is made. * * * The chief shall issue or renew the license of a facility for which proper application is made if the facility is operated in compliance

with this section and rules adopted thereunder. No license for a residential facility shall be issued or renewed nor the location of a license be transferred by the chief until he notifies, by certified mail, return receipt requested, or by personal service, the clerk of the legislative authority of the municipal corporation if the location of the residential facility is within a municipal corporation * * * . With respect to an application for issuance of a licen or transfer of the location of a license, notice to the general public of such opportunity to object or to comment in writing shall be given by the chief by one publication in one or more newspapers of general circulation in the municipal corporation or township in which the residential facility is proposed to be located.* * *"

"* * *At the time of the issuance or renewal of the license, the chief shall make written findings concerning the objections or comments and the decision on the issuance or renewal of the license. * * *"

Case Nos. CA-4969, CA-4971 and CA-4972

IN THE COURT OF APPEALS
FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ALEX J. GARCIA and
MARY GARCIA, et al
Plaintiffs-Appellees

vs.

SIFFRIN RESIDENTIAL ASSOCIATION FOR
THE DEVELOPMENTALLY DISABLED OF
STARK COUNTY, ET AL
Defendants-Appellants.

JUDGMENT ENTRY

Filed March 7, 1979

For the reasons stated in the Memorandum-Opinion on file, the judgments of the Court of Common Pleas of Stark County, Ohio, are reversd, at the costs of plaintiffs-appellees, and coming to enter the judgment which the Common Pleas Court should have rendered, it is ordered, adjudged and decreed that the permanent injunction prohibiting Siffrin Residential Association from operating a family home at 1532 Yale Avenue, N.W. Canton, Ohio, be, and it hereby is, dissolved and the complaints of plaintiffs dismissed; that R.C. 5123.18, be, and hereby is, declared constitutional in its entirety; and that the permanent injunction enjoining defendants, Dr. Timothy B. Moritz, Director, Department of Mental Health and Mental Retardation, and Dr. Levester Cannon, Commissioner of the Division of Mental Retardation and Developmental Disabilities, Department of

Mental Health and Mental Retardation, from issuing a license to Siffrin Residential Association for the Developmentally Disabled of Stark County, to operate a family home at 1532 Yale Avenue, N.W., Canton, Ohio, be, and the same herby is, dissolved. This cause is remanded to the Court of Common Pleas of Stark County, Ohio, for execution of this judgment and for costs.

/s/ John W. Potter
/s/ Clifford F. Brown
/s/ John J. Connors, Jr.
JUDGES

Case Nos. 78-450, 78-485

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

ALEX J. GARCIA & MARY GARCIA,
Plaintiffs

vs.

SIFFRIN RESIDENTIAL ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED OF STARK COUNTY

DR. TIMOTHY P. MORITZ, DIRECTOR
DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

DR. LEVESTER CANNON, COMMISSIONER
DIVISION OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

WILLIAM J. BROWN, ATTORNEY GENERAL
STATE OF OHIO,
Defendants

AND

OHIO LEGAL RIGHTS SERVICE,
Defendant Intervenor

CITY OF CANTON,

Plaintiff

vs.

SIFFRIN RESIDENTIAL ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED OF STARK COUNTY

DR. TIMOTHY P. MORITZ, DIRECTOR DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

DR. LEVESTER CANNON, COMMISSIONER DIVISION OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

WILLIAM J. BROWN, ATTORNEY GENERAL STATE OF OHIO,

Defendants

AND

OHIO LEGAL RIGHTS SERVICE,

Defendant Intervenor

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JUDGMENT ENTRY

Filed August 18, 1978

APPEARANCES:

THOMAS M. BERNABEI, ESQ.
Counsel for Alex J. Garcia
and Mary Garcia

LARRY A. ZINK, ESQ.
Counsel for Siffrin Residential
Association for the Developmentally
Disabled of Stark County

GEORGE STRICKER, JR., ESQ.
Asst. Attorney General
Counsel for Dr. Timothy P. Moritz,
Dr. Levester Cannon and William J.
Brown, Attorney General

JOHN GUENDELSBERGER,
ESQ., Counsel for Ohio Legal
Rights Service

HARRY E. KLIDE, ESQ.
Law Director
RONALD E. STOCKER, ESQ.
Asst. City Law Director
THOMAS B. ALBU, ESQ.
Asst. City Law Director
Counsel for City of Canton

Upon agreement of counsel, these cases were consolidated, as per Judgment Entry, and they were heard and tried as one case.

This matter came on for hearing on a request for preliminary injunction and a permanent injunction to enjoin the defendants from licensing and operating a family home for retarded female adults on premises located at 1532 Yale Avenue N.W. in the City of Canton, Stark County, Ohio, and requesting the Court to declare Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, unconstitutional.

The defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, in Case No. 78-450, besides filing their Answer, filed a Counterclaim against the plaintiffs, Alex J. Garcia and Mary Garcia, alleging that the plaintiffs, Alex J. Garcia and Mary Garcia, in seeking said restraining order and preliminary injunction, damaged the Siffrin Residential Association for the Developmentally Disabled of Stark County in the amount of Fifteen Thousand Dollars (15,000.00) and reasonable attorney fees.

The Court, after hearing testimony from all parties involved in both cases and hearing arguments and briefs and memorandums and contra briefs, issued a preliminary injunction enjoining the defendants from issuing a license for the operation of a family home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, and further enjoined the defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, from the operation of the proposed home, subject to a further hearing on the merits of the Complaints filed in both cases. Said preliminary injunction was filed with the Clerk of Courts of the Court of Common Pleas, Stark County, Ohio, on May 12, 1978. Subsequent thereto, the Court held a hearing on the final merits of the case, with the agreement and stipulation between the parties that the testimony introduced in the hearing for the preliminary injunction would be

reintroduced in its entirety for the hearing on the permanent injunction. In essence, this matter is before the Court to determine whether Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, is a constitutional statute and whether the City of Canton, pursuant to Chapter 713 of the Ohio Revised Code and Article XVIII, Section 3, of the Ohio Constitution, which is commonly known as the Home Rule Amendment, has the right to adopt and enact comprehensive zoning ordinances for the citizens of Canton.

This Court realizes that this creates a very emotional issue in the community, not only in the City of Canton but in other communities in the State of Ohio. The Court has heard testimony from numerous witnesses, which the Court is personally familiar with through the Court's dealings with the problems arising from mentally retarded persons and also from the Court's personal participation in such endeavors in its everyday dealings with these matters. But, a member of the Judiciary cannot be cognizable in a court of law and must follow what he believes the law to be, that the State is a servant of all the people and that the legislature, sitting in Columbus, Ohio, does not have the right to usurp the powers of a city council elected by the citizens of Canton to fulfill their wishes and to enact zoning ordinances for the citizens of Canton. To do so would not only usurp the powers of the Council of the City of Canton and the officers of the City of Canton, who were elected by its citizens, but would, in effect, disfranchise the voters of the City of Canton who elected their city councilmen and officers to enact proper legislation under the Constitution of the State of Ohio, as designated by the so called Home Rule Amendment.

Therefore, this Court finds in favor of the plaintiffs, in both actions, and declares Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, unconstitutional and adopts the Proposed Findings of Fact and Conclusions of Law of Alex J. Garcia and Mary Garcia, which are as follows:

FINDINGS OF FACT

1. Plaintiffs, Alex J. Garcia and Mary Garcia, are real property owners of a residence located at 1536 Yale Avenue N.W., Canton, Stark County, Ohio.

2. Defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, is a non-profit corporation incorporated under the laws of Ohio.

3. Defendant, Dr. Timothy P. Moritz, is the duly appointed and Acting Director of the Department of Mental Health and Mental Retardation for the State of Ohio.

4. Defendant, Dr. Levester Cannon, is the duly appointed and Acting Commissioner of the Division of Mental Retardation and Developmental Disabilities, Department of Mental Health and Mental Retardation for the State of Ohio.

5. The City of Canton, a non-chartered city, pursuant to Chapter 713 of the Ohio Revised Code and Article XVIII, Section 3, of the Ohio Constitution, has adopted a comprehensive zoning ordinance in Part Eleven of the Codified Ordinances of Canton, Ordinance No. 55/77, passed February 2, 1977, as amended.

6. The official zoning map of the City of Canton designates the area immediately surrounding the premises of 1532 Yale Avenue N.W., Canton, Stark County, Ohio, to be zoned "R-2" Two Family Residential District.

7. Chapter 1141 of the Codified Ordinances of Canton, "R-4" Multi-family Residential District, Ordinance No. 55/77, passed February 2, 1977, provides for the location in "R-4" zoned neighborhoods as a conditional use "boarding, lodging or rooming houses", which use the City of Canton applies to permit the establishment of "residential care facilities", to include "family homes".

8. Amended Substitute Senate Bill No. 71, effective October 31, 1977, amends Sections 3313.74, 5123.19 and 5123.99, and enacts new Section 5123.18 and repeals existing

Section 5123.18 of the Revised Code to expand the licensing program for residential facilities to include developmentally disabled persons and persons requiring similar services, and to limit restrictions on the location of such facilities.

9. Amended Substitute Senate Bill No. 71, Section 5123.18(D), provides in part: "Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, or any political subdivision."

10. Amended Substitute Senate Bill No. 71, Section 5123.18(G), provides that Division (D) of Section 5123.18 is not applicable to municipal corporations which had in effect on June 15, 1977 an ordinance specifically permitting in residential zones licensed residential facilities by means of permitted uses, conditional uses or special exceptions.

11. Other than the provision of Division (G) of Section 5123.18, Amended Substitute Senate Bill No. 71 provides for no procedure by which local government can control the placement of "developmentally disabled" persons within their governmental boundaries.

12. On November 17, 1977, the defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, purchased by Executor's Deed real property located at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, which premises are located adjacent to and share a common driveway with the residence of the plaintiffs, Alex J. Garcia and Mary Garcia.

13. Subsequent thereto, defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, made application to Dr. Levester Cannon, pursuant to Ohio Revised Code Section 5123.18(C), to license the operation of a "family home" for eight or less retarded female adults at 1532 Yale Avenue N.W., Canton, Stark County, Ohio.

14. Defendant, Dr. Levester Cannon, did initiate action preparatory to the issuance of a license to the Siffrin Residential Association for the Developmentally Disabled

of Stark County for a "family home" at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, pursuant to Ohio Revised Code Section 5123.18.

15. Letters of objection to proposed location were filed by Alex J. Garcia and Mary Garcia, the plaintiffs, and their neighbor, Dr. Mark Herbst, complaining of such factors as their concern over the small lots involved and the common driveway situation, possible invasion of privacy and property devaluation concerns. Dr. John Delaney of the Division of Mental Retardation reviewed these letters and found the complaints to be unsubstantiated.

16. Mr. Robert Pace of the Canton City Zoning Department filed a letter of objection to the proposed location, stating that the proposed facility would violate Canton's zoning ordinances. Dr. Delaney reviewed this objection and determined it to be superseded by the effect of Ohio Revised Code Section 5123.18(D).

17. Over fifty persons residing in the immediate Yale Avenue neighborhood signed a petition circulated by the plaintiffs, objecting to the location of the facility. Dr. John Delaney considered these expressed concerns to be "reaction", not necessitating further study into the advisability of licensure.

18. On April 21, 1978, plaintiffs, Alex J. Garcia and Mary Garcia, obtained a temporary restraining order against all defendants from issuing a license or operating a family home at 1532 Yale Avenue N.W.

19. On April 24, 1978, the Commissioner of Mental Retardation issued a family home license to the Siffrin Residential Association for the Developmentally Disabled of Stark County to operate a family home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, as of April 1, which was voided under this Court's temporary restraining order.

20. Under the definitions contained in Chapter 1123 of the Canton City Ordinance, "family" means one or more persons

occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, and who do not pay consideration for living there and who do not have an "operator" running the dwelling.

21. Ohio Revised Code Section 5123.18 defines " 'family home' as a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for not more than eight persons with developmental disabilities."

22. Ohio Revised Code Section 5123.18(B) provides that persons desiring to operate a family home residential facility must apply for a license.

23. The proposed Siffrin Residential Association for the Developmentally Disabled of Stark County "family home" will house up to eight female adults, two full-time houseparents and a part-time relief staff employed by the Siffrin Association for the Developmentally Disabled of Stark County and will be administered by a full-time director.

24. The proposed Siffrin Residential Association for the Developmentally Disabled of Stark County "family home" will operate, when at full capacity, on a budget of $65,000.00 per year.

25. As of April 24, 1978, four applicants had been accepted for admission into the Siffrin Residential Association for the Developmentally Disabled of Stark County home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio; as of June 27, 1978, no additional applicants had been selected.

26. Location of the proposed "family home" at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, immediately adjacent to the residence of Alex J. Garcia and Mary Garcia, will cause a diminution in the Garcias' property value.

27. Location of a group home housing eight mentally retarded adult men at 150 South Rose Avenue, Akron, Ohio, resulted in a thirty-five (35) percent tax valuation reduction

to the immediate neighboring property owned by Charles Zindle and Charlotte Zindle.

28. The Siffrin Residential Association for the Developmentally Disabled of Stark County was not prepared as of April 24, 1978 to operate the "family home" at 1532 Yale Avenue N.W., Canton, Stark County, Ohio. Contracts for staff were not executed, furniture not fully moved into the premises, and administrative paperwork on applicants not completed.

29. Defendant Siffrin Residential Association for the Developmentally Disabled of Stark County's only fixed expense on the house at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, is its monthly mortgage payment, which includes real estate taxes and insurance.

30. The plaintiffs, Alex Garcia and Mary Garcia, did not maliciously or fraudulently seek and obtain an injunction against the defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County.

CONCLUSIONS OF LAW

1. The plaintiffs, Alex J. Garcia and Mary Garcia, have standing, pursuant to Ohio Revised Code Section 713.13, to obtain an injunction in the instant matter, in that there exists "imminent threat" of violation of the City of Canton's Zoning Ordinances, they are "contiguous" property owners, and they will suffer "especial damages".

2. The defendant's, Siffrin Residential Association for the Developmentally Disabled of Stark County, proposed use of the premises located at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, as a "family home" is not a "family" within the meaning of Canton's Zoning Ordinances, effective February 14, 1977, and is not a permitted or conditional use in an R-2 zone.

3. Amended Substitute Senate Bill No. 71, subsections (D) and (E), Ohio Revised Code Section 5123.18(D) (E), are

not "general" laws of the State of Ohio within the meaning of Article XVIII, Section 3, of the Ohio Constitution.

4. Canton's Zoning Ordinances are enacted pursuant to the constitutional grant of powers of local self-government, Article XVIII, Section 3; are not subject to the "conflict" provision of Article XVIII, Section 3, of the Ohio Constitution; and are not superseded by Amended Substitute Senate Bill No. 71, subsections (D) and (E), Ohio Revised Code Section 5123.18 (D) (E).

5. Amended Substitute Senate Bill No. 71, subsections (D), (E) and (G), Ohio Revised Code Section 5123.18(D) (E) (G), are not uniform in their operation throughout the State of Ohio and are void as special laws prohibited by Article II, Section 26 of the Ohio Constitution.

6. Amended Substitute Senate Bill No. 71, subsections (D) and (E), Ohio Revised Code Section 5123.18(D) (E), are unconstitutional and in violation of the due process clauses of Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution in that they are arbitrary and capricious.

7. Amended Substitute Senate Bill No. 71, subsections (D) and (E), Ohio Revised Code Section 5123.18(D) (E), creates an arbitrary and discriminatory classification of persons and are unconstitutional under Article I of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

8. The plaintiffs, Alex J. Garcia and Mary Garcia, did, without malice or fraud, rightfully apply for and obtain injunctive relief against defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County.

It is, therefore, the finding of this Court that Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, is unconstitutional and that a permanent injunction is hereby ordered enjoining the defendants, Dr. Timothy P. Moritz, Director, Department of Mental Health and Mental

Retardation, and Dr. Levester Cannon, Commissioner of the Division of Mental Health and Developmental Disabilities, Department of Mental Health and Mental Retardation, from issuing a license to the Siffrin Residential Association for the Developmentally Disabled of Stark County to operate a family home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio.

It is the further order of the Court that the defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, is hereby enjoined from operating a family home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio.

It is the further order of the Court that the defendant's, Siffrin Residential Association for the Developmentally Disabled of Stark County, Counterclaim is hereby dismissed with prejudice, as they failed to show any damages caused to it by the plaintiffs, Alex J. Garcia and Mary Garcia.

It is the further order of the Court that final judgment is rendered in favor of the plaintiffs in this matter and the costs are hereby assessed against the defendants.

The Court further adopts the Proposed Findings of Fact and Conclusions of Law of the City of Canton, in Case No. 78-485, which are as follows:

FINDINGS OF FACT

1. Plaintiff, City of Canton, is a municipal corporation incorporated under and governed by the Constitution and Statutes of the State of Ohio.

2. Plaintiffs in Case No. 78-450, Alex J. Garcia and Mary Garcia, are the owners of certain real estate located at 1536 Yale Avenue N.W., Canton, Stark County, Ohio.

3. Defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, is a non-profit corporation incorporated under the laws of Ohio.

4. Defendant Dr. Timothy P. Moritz is the duly

appointed and Acting Director of the Department of Mental Health and Mental Retardation, State of Ohio.

5. Defendant Dr. Levester Cannon is the duly appointed and Acting Commissioner of the Division of Mental Retardation and Developmental Disabilities, Department of Mental Health and Mental Retardation, State of Ohio.

6. On or about November 17, 1977, defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, purchased by Executor's Deed real property located at 1532 Yale Avenue N.W., Canton, Stark County, Ohio.

7. Defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, has made application to defendant Dr. Levester Cannon, pursuant to Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18(C), to license operation of a family home at said premises.

8. Defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, has prepared to open a family home at said premises, has made structural changes and improvements to the premises, and will be the operator of such facility.

9. Consideration will be paid by, or on behalf of, all residents of Siffrin Residential Association for the Developmentally Disabled of Stark County's proposed facility.

10. Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, effective October 21, 1977, amends Sections 3313.74, 5123.19 and 5123.99, enacts new Section 5123.18, and repeals existing Section 5123.18 of the Ohio Revised Code to expand the licensing program for residential facilities to include developmentally disabled persons and persons requiring similar services, and to limit restrictions on the location of such facilities.

11. Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18(D), provides in part: "Any person may

operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political sub-division."

12. The City of Canton, pursuant to Chapter 713 of the Ohio Revised Code and Article XVIII, Section 3, of the "Home Rule" Amendment to the Ohio Constitution, has adopted a comprehensive zoning ordinance in Part Eleven of the Codified Ordinances of Canton, Ordinance No. 55/77, passed February 2, 1977, as amended.

13. The official zoning map for the City of Canton designates the area immediately surrounding the premises of 1532 Yale Avenue N.W., Canton, Stark County, Ohio, to be zoned "R-2" Two Family Residential District. Chapter 1137, "R-2" zoning permits only single or two family dwellings and does not permit a family home.

14. Chapter 1141 of the Codified Ordinances of Canton, "R-4" Multi-family Residential District, Ordinance No. 55/77 passed February 2, 1977, provides for the location in "R-4" zoned neighborhoods as a conditional use "boarding, lodging or rooming houses" which use the City of Canton applies to permit the establishment of residential care facilities, to include family homes.

CONCLUSIONS OF LAW

1. Siffrin Residential Association for the Developmentally Disabled of Stark County's proposed use of the premises located at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, will be a boarding, lodging or rooming house, as defined in Canton City Ordinance 1123.08.

2. A boarding, lodging or rooming house is not a permitted use in the R-2 District of the City of Canton.

3. Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, is not a general law, subjecting the City's zoning ordinance to the non-conflict theory of Article XVIII, Section 3, Ohio Constitution.

4. The zoning ordinance of the City of Canton is comprehensive and is not in conflict with general law in the State of Ohio.

5. Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, violates Article II, Section 26 of the Ohio Constitution and is, therefore, unconstitutional.

6. The zoning in the City of Canton is a matter of local concern only and, therefore, is not subject to the conflict clause of Article XVIII, Section 3, of the Ohio Constitution.

7. The City of Canton is entitled to a permanent injunction, enjoining Dr. Timothy Moritz and Dr. Levester Cannon from issuing a license to Siffrin Residential Association for the Developmentally Disabled of Stark County to operate a family home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio, and enjoining Siffrin Residential Association for the Developmentally Disabled of Stark County from operating the same.

It is, therefore, the finding of the Court that Amended Substitute Senate Bill No. 71, Ohio Revised Code Section 5123.18, is unconstitutional and that a permanent injunction is hereby ordered enjoining the defendants, Dr. Timothy P. Moritz, Director, Department of Mental Health and Mental Retardation, and Dr. Levester Cannon, Commissioner of the Division of Mental Retardation and Development Disabilities, Department of Mental Health and Mental Retardation, from issuing a license to the Siffrin Residential Association for the Developmentally Disabled of Stark County to operate a family home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio.

It is the further order of the Court that the defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County is hereby enjoined from operating a family home at 1532 Yale Avenue N.W., Canton, Stark County, Ohio.

It is the further order of the Court that final judgment is

rendered in favor of the plaintiff in this matter and the costs are hereby assessed against the defendants.

/s/ Harold E. DeHoff
HAROLD E. DeHOFF, JUDGE
Court of Common Pleas
Stark County, Ohio

Case Nos. 78-450, 78-485

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

ALEX J. GARCIA & MARY GARCIA,
Plaintiffs

vs.

SIFFRIN RESIDENTIAL ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED OF STARK COUNTY

DR. TIMOTHY P. MORITZ, DIRECTOR
DEPARTMENT OF MENTAL HEALTH & MENTAL RETARDATION

DR. LEVESTER CANNON, COMMISSIONER
DIVISION OF MENTAL RETARDATION & DEVELOPMENTALLY DISABILITIES
DEPARTMENT OF MENTAL HEALTH & MENTAL RETARDATION

WILLIAM J. BROWN, ATTORNEY GENERAL
STATE OF OHIO,
Defendants

AND

OHIO LEGAL RIGHTS SERVICE,
Defendant Intervenor

CITY OF CANTON,

Plaintiff

vs.

SIFFRIN RESIDENTIAL ASSOCIATION
FOR THE DEVELOPMENTALLY DISABLED
OF STARK COUNTY

DR. TIMOTHY P. MORITZ, DIRECTOR
DEPARTMENT OF MENTAL HEALTH &
MENTAL RETARDATION

DR. LEVESTER CANNON, COMMISSIONER
DIVISION OF MENTAL RETARDATION &
DEVELOPMENTAL DISABILITIES
DEPARTMENT OF MENTAL HEALTH &
MENTAL RETARDATION

WILLIAM J. BROWN, ATTORNEY GENERAL
STATE OF OHIO,

Defendants

AND

OHIO LEGAL RIGHTS SERVICE,

Defendant Intervenor

JUDGMENT ENTRY

This matter came on for hearing on the request for preliminary injunction and permanent injunction against the defendants, and by agreement of Counsel it was ordered that these cases be consolidated and tried as one.

It is further order of the Court that the Ohio Legal Rights Service was made a party as a defendant intervenor.

The Court hearing testimony and receiving numerous documents into evidence finds the issues in favor of the Plaintiffs and declares Amended Substitute Senate Bill No. 71, Ohio Revised Code Sections 5123.18, unconstitutional, and finds in favor of the Plaintiffs, Alex J. Garcia and Mary Garcia, against the Defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, on their Counterclaim. The Court further finds that a permanent injunction shall be issued.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a permanent injunction is hereby issued against Dr. Timothy P. Moritz, Director, Department of Mental Health and Mental Retardation, and Dr. Levester Cannon, Commissioner, Division of Mental Retardation and Developmental Disabilities, Department of Mental Health and Mental Retardation, from issuing a license to the Defendant, Siffrin Residential Association for the Developmentally Disabled of Stark County, to operate a family home located at 1532 Yale Avenue N.W., Canton, Stark County, Ohio.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Counterclaim filed by the Siffrin Residential Association for the Developmentally Disabled of Stark County against the Plaintiffs, Alex J. Garcia and Mary Garcia, in Case No. 78-450, is hereby dismissed and judgment is rendered in favor of the Plaintiffs, Alex J. Garcia and Mary Garcia.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Amended Substitute Senate Bill No. 71,

Ohio Revised Code Section 5123.18, is declared unconstitutional and is held null and void.

Exceptions to Defendants.

Defendants to pay costs of this action.

/s/ Harold S. DeHoff
Judge

cc: Thomas M. Bernabei, Esq.
Larry A. Zink, Esq.
George Stricker, Jr., Esq.
John Guendelsberger, Esq.
Harry E. Klide, Esq.

Case No. 79-409

IN THE SUPREME COURT OF THE STATE OF OHIO

ALEX J. GARCIA ET AL.,

Appellants

vs.

SIFFRIN RESIDENTIAL ASSOCIATION ET AL.,

Appellees.

Appeal from the Court of Appeals

for Stark County

July 30, 1980

This cause, here on appeal from the Court of Appeals for Stark County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Stark County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this day of 19,

Case No. 79-409

IN THE SUPREME COURT OF THE STATE OF OHIO

ALEX J. GARCIA ET AL.,

Appellants,

vs.

SIFFRIN RESIDENTIAL ASSOCIATION ET AL.,

Appellees.

MANDATE

July 30, 1980

To the Honorable Common Pleas Court
Within and for the County of Stark, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMANM, Clerk

Record of Costs: Docket Fee of $20.00 paid by City of Canton; Docket Fee of $20.00 paid by Vincent J. Bernabei.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The following constitutional provisions, statutes, and ordinances are involved in this Petition For Certiorari:

FEDERAL CONSTITUTIONAL PROVISIONS:

Section 1 of Amendment XIV to the Constitution of the United States:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO STATUTORY PROVISIONS:

Section 5123.18 (A) (3), Ohio Revised Code:

(3) "Family home" means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for not more than eight persons with developmental disabilities.

PROVISIONS OF THE CANTON ZONING ORDINANCE:

1123.08 BOARDING, LODGING OR ROOMING HOUSE.

"Boarding," "lodging" or "rooming house" means a building in which one or more rooms are occupied by one to ten persons, or in which one or more rooms are kept, used,

advertised, offered or maintained for the purpose of providing sleeping accommodations to persons for considerations. In addition to sleeping accommodations, laundry services may be provided by such house. A boarding, lodging or rooming house is not a hotel or motel as found in Chapter 1353 of these Codified Ordinances; nor is it a nursing home, rest home or home for the aging as defined in Ohio R.C. Chapter 3721.

"Boarder," "lodger" or "roomer" means a transient or nontransient person who is not a member of the family, nor related by blood, marriage or legal adoption to the operator of the house. (Ord. 55-77. Passed 2-14-77).

1123.24 DWELLING.

"Dwelling" means any building, or portion thereof, which is designed for or used for residential purposes; including one and two-family and multi-family, but not including a tent, tourist cabin, trailer, trailer coach, hotels, motels, boarding houses or lodging houses. (Ord. 55-77. Passed 2-14-77).

1123.25 DWELLING UNIT

"Dwelling unit" means a group of rooms arranged, maintained or designed to be occupied by a single-family (see definition of family), and consists of a complete bathroom, complete kitchen or kitchenette; and facilities for living, sleeping and eating. All of the facilities are to be located in contiguous rooms and used exclusively by such family and by any authorized persons occupying such dwelling unit with the family. (Ord. 55-77. Passed 2-14-77).

1123.26 DWELLING, SINGLE-FAMILY.

"Single-family dwelling" means a building designed for or used exclusively for residence purposes by one family. (Ord. 55-77. Passed 2-14-77).

1123.27 DWELLING, TWO-FAMILY.

"Two-family dwelling" means a building designed for or used exclusively for residence purposes by two families living independently of each other. (Ord. 55-77. Passed 2-14-77).

1123.30 FAMILY.

"Family" means one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, lodging house, motel, hotel, fraternity or sorority house. (Ord. 55-77. Passed 2-14-77).

1135.01 PURPOSE.

The R-1 District is established to accommodate low density (five units/acre), single-family residential dwellings in areas that are provided with City sewer and water facilities. (Ord. 55-77. Passed 2-14-77).

1135.02 PERMITTED USES.

Principal permitted uses are as follows:

(a) Single-family dwelling.

(b) • • •

(c) • • •

(d) • • •

(e) • • •

(f) • • •

(Ord. 55-77. Passed 2-14-77).

1137.01 PURPOSE.

The purpose of the R-2 District is to provide for two-family residences at a medium density of fourteen units/acre. (ord. 55-77. Passed 2-14-77).

1137.02 PERMITTED USES.

Principal permitted uses are as follows:

(a) Any use permitted in the R-1 District.

(b) Two-family dwellings. (Ord. 55-77. Passed 2-14-77).

No. 80—693

In The

Supreme Court of the United States

OCTOBER TERM, 1980

SIFFRIN RESIDENTIAL ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED OF STARK COUNTY, INC., *et al.*

Petitioners

v.

ALEX J. AND MARY GARCIA, *et al.*

Respondents

ON WRIT OF CERTIORARI TO THE THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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No. 80—693

In The
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OCTOBER TERM, 1980

SIFFRIN RESIDENTIAL ASSOCIATION
FOR THE DEVELOPMENTALLY
DISABLED OF STARK COUNTY, INC., *et al.*
Petitioners

v.

ALEX J. AND MARY GARCIA, *et al.*
Respondents

STATEMENT OF THE CASE

For several years the State of Ohio has licensed facilities for the care of mentally retarded persons, Ohio Revised Code Section 5123.18, as effective on October 31, 1977. The new Section 5123.18 was a major portion of Amended Substitute Senate Bill No. 71, making several additions and changes to the existing Section 5123.18: a series of definitions were added under sub-section (A); a notification procedure added under subsection (C); and an exemption for licensed facilities from compliance with

municipal zoning ordinances under subsections (D), (E) and (G). It is these "zoning" subsections which were at issue in the case below. [1]

[1] Effective July 1, 1980, 5123.18 has been renumbered as 5123.19 by Ohio Am. Sub. H.B. 900. Ohio Rev. Code Ann. 5123.19 (Page's Leg. Bull. at 338, 1980). References in this petition will be to Ohio Rev. Code Ann. 5123.18 (Page's Supp. 1979).

The portions of R.C. 5123.18 as enacted which are germane to this discussion are as follows:

"(A) As used in this section and section 5123.19 of the Revised Code:

"(1) 'Residential facility' means a home or facility in which a person with a developmental disability resides, except a home subject to Chapter 3721 of the Revised Code or the home of a relative or legal guardian in which a person with a developmental disability resides.

"(2) 'Developmental disability' means a disibility that originated before the attainment of eighteen years of age and can be expected to continue indefinitely, constitutes a substantial handicap to the person's ability to function normally in society, and is attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other condition found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior or requires similar treatment and services.

"(3) 'Family home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for not more than eight persons with developmental disibilities.

"(4) 'Group home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for at least nine but not more than sixteen persons with developmental disabilities.

"(B) Every person desiring to operate a facility shall apply for licensure of the facility to the chief of the division of mental retardation and developmental disabilities.

"***

"(D) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are imposed upon all single-family residences within the district or zone.

"(E) Any person may operate a licensed group home as a permitted use in any multiple-family residential district or zone of any political subdivision.***

In November 1977, Petitioner, Siffrin Residential Association, purchased a residence at 1532 Yale Avenue, N.W., Canton, for the proposed use as a "residential facility" to house eight or fewer "developmentally disabled" female adults. This site is in an area zoned R-2 within Chapter 1137 of the Canton City Ordinances, which zoning classification restricts the sites to one and two-family dwellings. [2]

"(F) This section does not prohibit a political subdivision from applying to residential facilities nondiscriminatory regulations requiring compliance with health, fire, and safety regulations and building standards and regulations.

"(G) Divisions (D) and (E) of this section are not applicable to municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed facilities by means of permitted uses, conditional uses, or special exception, so long as such ordinance remains in effect without any substantive modification."

2 The sections of Chapter 1137 of the Canton city zoning ordinance which are pertinent to this discussion are as follows:

"1137.02 Permitted Uses.

"Principal permitted uses are as follows:

"(a) Any use permitted in the R-1 District

"(b) Two-family dwellings."

Within the zoning ordinances of Canton are the following definitions:

"1123.24 Dwelling.

" 'Dwelling' means any building or portion thereof, which is designed for or used for residential purposes; including one and two-family and multi-family, but not including a tent, tourist cabin, trailer, trailer coach, hotels, motels, boarding houses or lodging houses.

"1123.25 Dwelling Unit.

" 'Dwelling unit' means a group of rooms arranged, maintained or designed to be occupied by a single-family (see definition of family), and consists of a complete bathroom, complete kitchen or kitchenette; and facilities for living, sleeping and eating. All of the facilities are to be located in contiguous rooms and used exclusively by such family and by any authorized persons occupying such dwelling unit with the family.

Respondents, Alex J. and Mary L. Garcia, are owners of a residence located adjacent to the proposed facility, in which residence they have lived for approximately 25 years.

In March 1978, Siffrin made application to the Ohio Department of Mental Health and Mental Retardation, pursuant to R.C. 5123.18, for licensure of the home. The department, pursuant to law, issued a notice to the Canton Planning Commission, Canton Board of Zoning Appeals and the Clerk of Canton City Council, prior to the publication of the required legal notice. Letters of objection to the proposed location were filed by Mr. Garcia and another neighbor. Subsequently, a petition was signed by some 50 residents in the neighborhood, objecting to the location of this facility.

The Canton Zoning Department also filed a letter of objection, stating that the proposed use was neither a permitted use nor a conditional use in a R-2 district, and that the home as pr osed could only qualify as a "boarding house" or "rooming house," a conditional use in a R-4 residential district.

The Department of Mental Health and Mental Retardation reviewed the objections, including that of the city of Canton, and determined that zoning restrictions imposed by the ordinance were superseded

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"1123.27 Dwelling, Two-family.

" 'Two-family dwelling' means a building designed for or used exclusively for residence purposes by two families living independently of each other.

"1123.30 Family.

" 'Family' means one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, motel, hotel, fraternity or sorority house."

by the effect of R.C. 5123.18 and, more specifically, subsection (D) thereof, which, in pertinent part, states as follows:

> Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision.

This present cause was thereafter instituted on April 21, 1978, by the filing of the complaint by the Garcias, in the Court of Common Pleas of Stark County, seeking to enjoin Siffrin from establishing a "family home" at 1532 Yale Avenue, and requesting that R.C. 5123.18 (D) be declared unconstitutional. Respondents also requested that Drs. Moritz and Cannon of the Department of Mental Health and Mental Retardation be enjoined from licensing the home.

Respondent, City of Canton, filed a complaint against the same defendants, also seeking to enjoin the licensing and establishment of this "family home," and to have R.C. 5123.18 (D) declared unconstitutional.

Petitioner, Ohio Legal Rights Service, moved and was granted leave to intervene as a party-defendant. After a hearing, a preliminary injunction was granted to the respondents enjoining the director from issuing a license for this operation.

Upon trial of this matter, evidence was adduced showing that Siffrin is a corporate entity controlled by a board of directors; that the corporation has at least one other "residential facility" in operation; and that the overall operations of this proposed facility, as well as the currently operating facility, are under the control of a director. The staff that was to be brought into this proposed operation, in addition to the director, would be a married couple who would reside on the premises, two other women working fulltime, and other special purpose training staff as needed to carry out the "habilitation services" and "personal care" as provided by statute and

regulations. "Habilitation," as defined in R.C. 5123.68 (G), "means the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, social, and vocational efficiency. Habilitation includes but is not limited to programs of formal, structured education and training ***."

The director and admissions committee screen the applicants for the home, and individual month-to-month contracts are entered into with either the individual, member of the family or guardian, or the State of Ohio if the person was institutionalized. The amount charged for the services to be given the individual varies with the physical or educational needs or requirements of the individual. The clients are persons with one or more "developmental disabilities"; all are characterized by deficiencies in adaptive behavior, in socialization, and in life skills, and some have both neurological and organic disabilities or damage.

The budget for this facility would be approximately $61,000, "broken down ***(into) direct care, indirect staff cost for secretarial, administrative, administrative non-personnel cost, telephone, travel, things of this nature, food, mortgage, utilities, depreciation, insurance, things like this." There is a rather complex funding of residents, including federal and state funds for room and board reimbursement.

Thereafter, on August 18, 1978, Judge DeHoff of the Court of Common Pleas of Stark County, issued his Findings of Fact and Conclusions of Law, finding that the proposed use was not a "family" within the meaning of Canton's zoning ordinances and consequently not a permitted or conditional use in an R-2 zone; that Ohio Revised Code 5123.18 (D) and (E) did not supercede Canton's zoning ordinances under Ohio Constitutional

Law; and that Ohio Revised Code 5123.18 (D) and (E) were in fact null and void under both Ohio and federal constitutional law. Petitioners were permanently enjoined from operating their home and/or licensing it pursuant to the state law.

Judgment was accordingly entered for the Garcias and the city of Canton. Siffrin, Drs. Moritz and Cannon, and the Ohio Legal Rights Service thereafter appealed the decision of the Court of Common Pleas to the Court of Appeals. The members of that court rendered their opinion and judgment in March 1979, reversing the judgment of the trial court on all issues.

The Garcia's and the City of Canton thereafter filed their appeal to the Ohio Supreme Court, which rendered its decision on July 30, 1980, reversing the decision of the Court of Appeals. The headnotes to the Ohio Supreme Court decision provide as follows:

> 1. A "family home," as defined in R.C. 5123.18 (A) (3), is not a "family" use, as defined in the Canton city zoning ordinance, and is not a permitted use in the R-2 zoned district under such ordinance.
> 2. The enactment of zoning laws by a municipality is an exercise of the "police power," rather than an exercise of the power of "local self-government," as granted by Section 3, Article XVIII of the Ohio Constitution.
> 3. R.C. 5123.18 (D) and (E) are not "general laws" of the state within the meaning of Section 3, Article XVIII of the Ohio Constitution; therefore, Chapter 1137 of the Canton city zoning ordinance, which prohibits a "family" use as contemplated by R.C. 5123.18 is not unconstitutionally in conflict with a "general law" of the state.

4. R.C. 5123.18 (D), (E) and (G) are "special laws" in violation of Section 26, Article II of the Ohio Constitution, and are therefore unconstitutional. 63 Ohio St 2d at 259.

The decisions of the Court of Common Pleas, Court of Appeals, and Ohio Supreme Court are not reproduced herein. Reference is made to the Appendix of Petitioners' Petition for Writ of Certiorari for full copies of these opinions.

REASONS FOR DENYING THE WRIT

1. THE FEDERAL QUESTION PRESENTED IN PETITIONERS' WRIT OF CERTIORARI WAS NOT ADEQUATELY RAISED OR PRESERVED IN THE COURTS BELOW.

Respondents question the sufficiency of the raising and preservation in the courts below of the federal question herein presented. The case in the Ohio courts was tried solely on Respondents' challenge to the constitutionality of Ohio Revised Code 5123.18, and the issue of whether or not that state statute superseded local zoning.

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3. Assignment of error No. II of Petitioner, Ohio Legal Rights Service, read as follows:

> The lower court erred in excluding the proposed home from the R-2 zoning district because such an interpretation and application of the Canton Zoning Ordinance would violate Sections 1, 16 and 19 of Article I of the Ohio Constitution, the due process and equal protection clause of the 14th Amendment to the United States Constitution, and Chapter 4112, Ohio Revised Code.

The Court of Appeals ruled on Petitioner's Assignment of Error No. II as follows:

> This assignment of error is well taken. The Canton zoning law applied to prohibit the Siffrin home in an R-2 district is unconstitutional. Article 1, Section 19, limits the exercise of police powers, including zoning regulations, to that which has a substantial relation to the public health, morals, safety or public welfare. Youngstown v. Kahn Bros. Building Co. (1925), 112 Ohio St. 654. A zoning ordinance which forfeits an owner's rights or deprives the owner of the free use of his property, or which is unreasonably applied to exclude an institutional home in a residential neighborhood, violates Article 1, Section 19, Ohio Constitution. State, ex rel. Synod of Ohio v. Joseph (1942), 139 Ohio St. 229. Cf. Women's Kansas City St. Andrew Soc. v. Kansas City (8th Cir. 1932), 58 F. 2nd 593; Village of University Hts. v. Cleveland Jewish Orphans' Home (6th Cir. 1927), 20 F. 2d 743.

Petitioners in their pleadings in the trial court did not seek declaratory or injunctive relief against Canton's zoning ordinance and no findings were made either in favor of or against the constitutionality of the Canton zoning ordinance by the trial court. *See* Findings of Fact and Conclusions of Law of the Common Pleas Court of Stark County, Ohio, set forth at Appendix A-46 of the Petition for Writ of Certiorari.

The consitutionality of the application of the Canton Zoning Ordinance to prohibit the Siffrin home from the City's R-2 district was first raised in the Court of Appeals in one assignment of error only; [3] and subsequently again in the Ohio Supreme Court, again on one assignment of error only. [4] Nowhere, however, was the question presented herein specifically raised.

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4. Assignment of Error No. 8, of Respondents, read as follows:

> Application of the city of Canton's zoning ordinance to prohibit the proposed use of the Siffrin Residential Association's 'family home' in an R-2 district is a constitutional exercise of the city's police powers.

The Supreme Court of Ohio ruled on Respondents' Assignment of Error No. 8 as follows:

> Local comprehensive zoning plans have long been held to be a valid exercise of governmental planning and control of land use for benefit of public health, safety, morals, and general welfare. *Village of Euclid v. Ambler Realty Co., supra.* The various zoning provisions, which set forth certain prohibitions, restrictions, or limitations upon the free utilization and enjoyment of one's lands must be a part of a reasonably comprehensive plan for the development of the community. *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1; *Village of Euclid v. Ambler Realty, supra.*
>
> A zoning ordinance shown to have a substantial relation to the public health, morals or safety, and not to be arbitrary or discriminatory in its operation or effect, will be upheld as a proper constitutional exercise of the police power of local government.

2. THE QUESTION PRESENTED BY PETITIONERS' WRIT OF CERTIORARI LACKS FACTUAL SUBSTANTIATION IN THE RECORD AS TO THE DISCRIMINATORY APPLICATION BY THE CITY OF CANTON OF ITS ZONING ORDINANCES AGAINST MENTALLY RETARDED PERSONS.

Petitioners exaggerate, if not in fact completely distort, the question presented by representing to the court that the City of Canton has prohibited mentally retarded persons from living in "family homes" in its two-family residential districts while permitting college students, elderly persons and other groups of unrelated persons to live in the same districts. This allegation is based not upon a showing in the record of such facts, but rather upon Petitioners' artful cross-examination,

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Here we find that the provision of the Canton zoning ordinance which would prohibit the establishment and operation of this residential facility within a R-2 zoned area is a reasonable exercise of the police power granted to municipalities pursuant to Section 3, Article XVIII of the Ohio Constitution.

The overall Canton zoning ordinance seemingly provides for a comprehensive plan for the growth and development of the city. It may be concluded that the specific section here involved has been enacted as a reasonable part of the overall zoning plan, and it has not been shown that such provision is arbitrary, capricious or discriminatory in its operation. We find that such section of the zoning ordinance does not forfeit an owner's rights or deprive him of the reasonable free use of his property. Accordingly, we hold that such section of the ordinance does not violate Section 19, Article I of the Ohio Constitution, nor the Fourteenth Amendment to the United States Constitution, and therefore we find the provision to be constitutionally valid. 63 Ohio St. 2d at 273-74.

through the use of hypothetical questions, of the City of Canton's Zoning Inspector. Cross-examination of the City's Assistant Planning Director revealed that in fact such discrimination was not practiced. [5]

The record in this case is totally devoid of any showing by petitioners that any such policy by the City of Canton, or even any single act of such kind of discriminatory conduct, as alleged in their question presented to this Court, existed.

Respondents consequently contend that the record does not support the question presented and that a writ of certiorari should be denied.

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[5] The following portions of testimony are excerpted from the record transcript testimony of Mr. James Bowe, Assistant Director of the Department of Planning for the City of Canton:

CROSS-EXAMINATION BY MR. GUENDELESBERGER:

Q. Mr. Bowe, you were present during Mr. Pace's testimony I went through certain hypotheticals with him as to various types of living situations and what they would be considered if they were to locate in a R-2 residential district. I wonder if I could just go through those same hypotheticals with you and see how your answers compare with his in terms of whether these living situations would be family, single housekeeping, whether they would be permitted in a R-2 district. I think I started out asking him whether under the 1977 definitions whether I could own that home live there with a brother and sister?

A. That's your question sir?

Q. Yes.

A. Yes you could.

Q. R-2 permitted use as a family?

A. Yes.

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Q. If you found out that I was living there with four or five friends, you got a complaint, there's five unrelated people living next door to us violating zoning, what are you going to do about it, its an R-2 district so you came out to my residence where I'm living with my four friends none of us related, what would you do to determine whether we could continue to live there or whether you in forcement of the zoning codes at a neighbor's request would come in attempt to enjoin us from continuing our residence?

3. THE QUESTION PRESENTED LACKS FEDERAL CONSTITUTIONAL SIGNIFICANCE.

Respondents deny that this is a proper case for a writ of certiorari because the legal significance of the case, in terms of federal law, is limited. The litigation below focused on state constitutional issues, involving important "home rule" issues. The question presented by petitioners, as previously discussed, was never specifically raised below and the federal constitutional law virtually ignored.

A. I think we would have to employ the criteria established both under family and under rooming and boarding house. If you as the owner for instance as long as it's hypothetical, if you as the owner were charging the individuals rent or consideration, if they were unrelated to you, and whether or not you were offering your residence for living purposes. If one of your friends moved out would you secure another individual to take his place, if it would meet these criteria I think we'd probably refer that to the law department for an opinion, we'd probably look at it as a rooming and boarding house. All three or four of you living there jointly, sharing expenses and duties, it would be a gray area as whether or not you'd be considered a family.

Q. Would you look to see if we were living as a single housekeeping unit?

A. I think that would probably be one of the things to be looked at in a situation like that.

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Q. You're saying then that if these people should pay consideration to me that that would be a factor, may be a deciding factor in determining if that's a boarding house rather than a family?

A. That would be a factor, yes sir.

Q. Would that be a decisive factor?

A. That among the other factors, all together would tell whether it was a rooming or boarding house.

Q. In a R-2 district, if I own that home, I don't live there, I just rent it to four or five of my friends, you get the complaint, you go out, you investigate the situation, what factors, same factors and what would be the determination?

The question concerning the application of the City of Canton's zoning ordinances to prohibit Siffrin's "family home" from a two family residential district is not a constitutional question, but rather a definitional and factual one.

On the facts contained in the record the Ohio Supreme Court ruled as follows in regard to this issue:

> Here, based upon the facts within the record, some of which have been alluded to previously, we conclude that residents of these licensed facilities may not reasonably be includable within the definition of "family" as set forth in the Canton zoning code. We do not perceive this facility, and its statutorily mandated purposes and duties, to be likened to what is reasonably

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A. Again, if those four individuals you as an absentee owner renting the home if the four individuals would move in jointly together sharing all expenses, sharing the home and the duties of the home, it could be considered as a family.

Q. Make any difference if some of the persons I were renting to were mentally retarded?

A. No.

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Q. I live in an R-2 district take in two unrelated aged persons, they pay me fair share of the rental cost of the home and the upkeep, I also do some cooking for them, offer them some personal assistance in dressing, et cetera?

A. You'd be the owner of a home living in a R-2 district, you would take aged people in and provide them a place to stay and other services, you'd have a boarding house situation.

Q. That wouldn't be within the definition of family?

A. No sir.

Q. Persons living together as a single housekeeping unit? I hope I make that clear to you the situation we are living as a single housekeeping unit?

A. You may be living as a single housekeeping unit, again the definition of family distinguishes rooming or boarding houses, it employs the fact an operator and compensation are concerned.

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thought of to be a single housekeeping unit. We believe the facts show that these clients of Siffrin would not be residing in this dwelling unit as a single housekeeping unit in the same sense as would a group of individuals who had joined together in these premises in order to primarily share the rooming, dining and other facilities. The emphasis in such an instance may be placed upon the dwelling aspect of the unit, and upon the fact that those who are living within that structure are sharing and maintaining a household as a single unit.

We conclude based upon all the evidence that the Siffrin facility would be established not for the prime purpose of eight people sharing a dwelling place, but primarily for the purpose of bringing together a group of developmentally disabled persons for their training and education in life skills, and for the establishment and furnishing of a professional plan of habilitation for each client developed by the licensed operator and implemented through the director of such facility and his staff of inter-disciplinary personnel trained and equipped for this purpose. The individualized care and training of these clients who are the resident participants of this program would reasonably appear to be the basis of this program sought to be located at this site.

We do not believe that the operation of this facility constitutes a "family" within the definition of the Canton zoning code. 63 Ohio St. 2d at 268-69.

Respondents contend that this question, being definitional and factual in nature, is not appropriate for this Court to determine.

4. THE DECISION OF THE OHIO SUPREME COURT BELOW IS NOT IN CONFLICT WITH ANY DECISIONS OF THE UNITED STATES SUPREME COURT.

No previous decision of the United States Supreme Court suggests the result argued for by petitioners in the instant matter. Petitioners' reliance, for example, on *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), is misplaced in the context of the present case. Canton's ordinance does not, either on its face or in its application, deny a grandmother from living with her grandchildren, as did the East Cleveland ordinance struck down in *Moore*. The rationale of *Moore* rests heavily on the court's recognition that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition," 431 U.S. at 503, "family" being further defined in that opinion to mean "the tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children." 431 U.S. at 504.

That decision does not explicitly recognize "economic" and "emotional" needs as significant bases for the tradition of the extended family, as argued by Petitioners at page 11 of their petition, and does not provide support for their argument that a proposed "family home" for the developmentally disabled located in the State of Ohio, with its statutorily mandated purposes and duties, is to be considered a "family".

5. THE DECISION OF THE OHIO SUPREME COURT BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR WITH THE DECISIONS OF ANY COURTS OF APPEALS.

Petitioners argue that the decision of the Ohio Supreme Court conflicts with the decisions of two state courts of last resort in *Berger v. State*, 71 N.J. 206, 364 A. 2d 993 (1976), and *City of White Plains v. Ferraioli*, 34 N.Y. 2d 300, 313 N.E. 2d 756 (1974). These cases, however, are distinguishable.

In *Berger v. State*, involving the proposed location contrary to local zoning of a state operated group home for eight to twelve multi-handicapped, preschool children in a single-family residential zone, the court upheld the intended use on the narrow ground that state agencies were immune from municipal zoning. 364 A. 2d at 999-1000. The court went further and also held the local zoning ordinance definition of family, which defined "family" as persons related by blood, marriage, and adoption, as too narrowly restrictive and thus invalid on substantive due process grounds. 364 A. 2d at 1002. However, this determination is not relevant to the present case since the City of Canton's ordinance does not contain such requirements.

The Court in *City of White Plains v. Ferraioli* found that the intended location, again contrary to local zoning, of a "group home" composed of a husband and wife, their two natural children, and ten foster children, in a single-family residential district, was a proper use in that this particular household unit was closely akin, if not identical, to a traditional family. This use, the court held, met the test of a "single family" developed by the

court, i.e., "a group headed by a householder, caring for a reasonable number of children as one would be likely to find in a biologically unitary family". 313 N.E. 2d 759. *City of White Plains* is thus factually distinguishable from the instant case, in which the Ohio Supreme Court found the proposed use to be institutional in nature, rather than akin to a "traditional family."

The instant case is also distinguishable from and not in conflict with the decisions of the Federal Courts of Appeals cited by petitioners, *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F. 2d 743 (6th Cir. 1927), *cert. denied*, 277 U.S. 569 (1927) and *Women's Kansas City St. Andrew Society v. Kansas City*, 58 F. 2d 593 (8th Cir. 1932). *Village of University Heights* involved the refusal of the local planning and Zoning Commission of the Village of University Heights to permit use of certain residential land in the Village for an orphanage, which use otherwise met all zoning requirements, for the reason that "the public convenience and welfare would not be served by the intended use." 20 F. 2d at 742. In *Village of University Heights*, no substantive provisions of the local zoning ordinance prohibited the use other than the discretion of the Commission and no facts were found to justify the denial; in *Siffrin*, however, the proposed use is specifically prohibited by ordinance if it does not qualify as a "family" and the facts as determined by the trier of fact and the Ohio Supreme Court did not support it to be a "family".

Women's Kansas City St. Andrew Society similarly involved the discretionary authority of the Board of Zoning Appeals in refusing to permit location for a philanthropic "old ladies home" in a one and two-family zoned district, where philanthropic uses were permitted

conditionally "provided such location will not seriously injure the appropriate use of neighboring property." 55 F. 2d at 593. Again, the denial by the local board was solely discretionary, as in *Village of University Heights*, and consequently the rationale thereof is not applicable to or in conflict with the present case.

CONCLUSION

For the foregoing reasons, Respondents, Alex J. and Mary L. Garcia and the City of Canton, respectfully request that the writ of certiorari to review the judgment of the Ohio Supreme Court, dated July 30, 1980, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari were served by regular United States mail on this _____ day of January, 1981, to the following listed persons: William J. Brown, Attorney General of the State of Ohio, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215; George Stricker, Jr., Assistant Attorney General, Attorney for the Petitioner, Rudy Magnone, Ph. D., State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215; Larry Zink, Esq., Attorney for Petitioner, Siffrin Residential Association, 3711 Whipple Avenue, N.W., Canton, Ohio 44715; and John Guendelsberger, Esq., Attorney for Petitioner, Ohio Legal Rights Service, 8 East Long Street, 6th Floor, Columbus, Ohio 43215. I further certify that all parties required to be served have been so served.

Thomas M. Bernabei
Assistant Law Director
City of Canton